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Volume 20

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

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vs.

THE CEMENT INSTITUTE, et al.

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vs.

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46713 New York, New York,
Monday, October 21, 1940.

46714 RAYMOND W. MOORE resumed the stand and testified further as follows:

Direct Examination by Mr. Seeley (Continued).

Q. Mr. Moore, at the close of the last hearing, we were discussing the conversion tables used by the Dewey Portland Cement Company, which you identified for us as Respondents' Exhibits 3597-A and B, 3598-A and B, and 3599-A and B.

Now, can you tell us, Mr. Moore, whether since you have been with the Dewey Company there has been any—or tell us, what has been your experience with respect to the railroads whose tariffs you used regularly in your busi-
46715 ness with reference to the method, if any, of the disposition of fractions?

46716 The Witness: At various times, especially following orders of the Interstate Commerce Commission prescribing, or granting permission to make percentage increases, or percentage reductions in rates, the carriers, through their publishing agents, have issued schedules containing rules for disposition of fractions.

By Mr. Seeley:

46717 Q. And have the railroads issued those rules since you have been with the Dewey Company?

A. Yes, sir.

Q. And have there been changes in those rules since that time?

A. Yes, sir.

Q. I am not sure whether the record shows clearly as of last Friday, whether you, in your department, Mr. Moore, have made changes in the conversion tables which you have used, which your company has used during that time?

A. Yes, I testified that we had made changes to take care of varying changes in rates.

The witness identified Resp. Ex. 3600-A to blank as a blanket supplement to numerous Southwestern Freight Bureau tariffs enumerated in the tariff effective August 26, 1920, issued by F. A. Leland, agent, St. Louis, Mo., August

16, 1920; the rule for the disposition of fractions is Rule 8 in that publication; Resp. Ex. 3601-A to blank is a blanket supplement issued by a number of agents for the
46718 carriers appearing on the front cover, dated January 20, 1922 and effective July 1, 1922, containing in Rule 6 a similar rule for disposition of fractions.

Q. Now, just one question. Does that Rule 6, to which you have just adverted pertain to increased rates or reduced rates?

A. Reduced rates.

Q. An in the case of Rule 8, to which you adverted a moment ago, does that pertain to increased rates or reduced rates?

A. Increased rates.

Q. And subsequent to the issue, can you tell us whether subsequent to the issuance of these tariffs, containing these rules, did the Dewey Company make any changes in its conversion tables which you have previously identified? I beg your pardon. Here are the originals, those are photostats.

A. Yes, we apparently did. Respondents' Exhibit 3597-A and B, is apparently the conversion schedule in effect prior to August 26, 1920, and Exhibit 3599-A and B, apparently contain the changes in rates brought about by the blanket supplement of August 26, 1920.

46719 Q. Well, Mr. Moore, what I had in mind particularly, my question was directed particularly to the matter of the disposition of fractions, whether the Dewey Company had made any change subsequent to that time subsequent to the issuance of these railroad tariffs in its method of disposing of fractions.

A. You mean, in computing the rates in cents per hundred pounds?

Q. Yes.

A. Into freight per barrel? No, the same principle was carried out.

Q. You told us on Friday that your company has, at times, received the freight rate books of the Cement Institute. Did the Dewey Company, or did you, in your capacity as head of the Tariff Department, ever make any change in your conversion tables, or your method of disposing of fractions, since you have been a member of The Cement Institute?

A. No.

Q. I am referring now to Commission's Exhibit 1110-A to blank.

46720 *Examination on Voir Dire by Mr. Wooden.*

Q. Referring to Respondents' Exhibits 3600-A to blank, and 3601-A to blank, those rules for disposition of fractions by the railroad, are all with regard to the figuring of rates per hundred pounds, are they not, Mr. Moore?

A. Yes.

Q. And they—

A. Well, pardon me. It goes further than that. It goes to the disposition of fractions, in rates per car.

46721 Q. All right.

A. Also.

Q. Rates per hundred pounds and rates per car?

A. That is all I see just now.

Q. You did not find anything in the railroad tariffs anywhere, do you, that provides for the disposition of fractions on a barrel of cement?

A. No.

Q. Or do you know of any railroad rules for disposition of fractions regarding freight on any units other than hundred pounds or carloads?

A. Those are the only ones I know of, those exhibits there.

46727 (RESP. EXS. 3600-A and 3600-B, and 3601-A, 3601-B, and 3601-C were offered and received in evidence.)

(RESP. EXS. 3597-A, 3597-B, 3598-A, 3598-B, 3599-A, 3599-B were offered and received in evidence.)

By Mr. Seeley:

Q. I have just one question, Mr. Moore.

Will you just tell us briefly what use you make of this table, just how you handle it, the mechanics of it, in one sentence, please.

A. You are referring to Respondents' Exhibit 3597-A and B?

Q. Yes, and I hope that you might give us your answer with respect to the other conversion tables which

46728 your company has used, you say, since 1912.

A. Well, the conversion schedule is used to de-

rive mill nets for delivered prices appearing in the schedule, taking any particular delivered price and following up the headline in which that price appears, will be found the mill net for each freight rate.

Q. And you say, "derive mill nets," derived from what, Mr. Moore?

A. From delivered destination prices.

Q. And where do you get those prices?

A. They appear in each column throughout the table.

Q. And how do they get to those columns, where do they come from?

A. Well, we get them, those are the prices that we gather from the field.

Q. And the freight rate that you mentioned, where did you get that from?

A. From the freight tariffs.

Q. From the tariffs or from your compilations?

A. Well, they originate from the tariff, but they come from our compilations from the tariffs.

Q. Mr. Moore, can you tell us whether the Dewey Company has ever furnished any of its salesmen with compilations of the freight rates?

A. We have not, not since I have been with the company.

46729 Q. Well, had the Dewey salesmen, to your knowledge, at any time, ever carried the freight rate books of The Cement Institute?

A. No, sir.

Q. Or of any other Freight Rate Bureau?

A. No, sir.

Q. Tell us briefly, please, what do your salesmen carry with them in the way of price information.

A. Price schedules for prices at each destination in their respective territories at points, destinations, where there are dealers located.

Q. And where do they get those lists?

A. Furnished from the sales office.

Q. And was there any change in the practice of your company with respect to these lists of destination prices during the so-called N.R.A. Code period?

A. No, sir.

Q. Has there been any change in that practice at any time since you have been with the company?

A. No, sir.

46730 Q. I would like to ask with respect to the freight rate compilations which you say you prepared in your company and have prepared since 1912, do you use those compilations in making out shipping papers?

A. Yes, sir.

Q. And does your company make out, use those shipping papers in making out its bills of ladings?

A. Bills of lading are made from the shipping papers, yes, sir.

Q. Now, I have just one further question before I leave this topic.

With reference to your testimony on Friday, in which you told us about the practice of your company in respect to routing of shipments, you said, I think, that your freight rate compilations do not contain any routings?

A. That is correct.

Q. Well, has the Dewey Company ever concerned itself with the routings from mills other than its own?

A. No, sir.

Q. And in actual practice, what has been your experience, have you had to, or have you referred to the tariff or routings frequently or infrequently?

A. Well, it is rather infrequently, considering the number of shipments that are made.

As of July 1, 1937 the capacity of the Dewey
46713 mill was 4500 barrels a day and that of the Davenport mill was 4800 barrels a day. The capacity of the mills as of July 1, 1937 is very much greater than it was when the mills were built. At the time the Dewey mill was built, I believe its capacity was 2000 barrels a day, and when the Davenport mill was built, as I recall it, its capacity was 3000 barrels a day. The capacity at Dewey was increased gradually over a period of years to about 1925, I believe, by the addition of additional kilns, and by enlarging the burning cores of the kilns. The capacity of the Davenport mill was increased in 1928 or 1929, I believe, by the addition of a third kiln, which was of the same size as the other two kilns. As the time we made those increases, we had found that the demand for
46732 our cement was gradually increasing, and the increase in productive capacity was to take care of the increased amount for the Dewey product. As I recall it no increase has been made in the capacity at Dewey since 1925, that is, as far as the kiln capacity is con-

cerned, and no increase in capacity has been made at Davenport since 1928.

By estimates of the plant capacity as of July 1937 and at present were based on what we think that plant will produce under maximum operating conditions for a full 365 (days) on a daily basis. We have actual operating experience on which that is based. We knew that they would produce under favorable conditions the maximum figures that I have given.

Q. Well, were you aware that the capacities of the Dewey Cement plants have been stated by Mr. W. S. Mallory?

A. Yes, I understand he made some statement regarding the capacities of our plants.

46733 Q. Well, I am referring, Mr. Wooden, to Commission's Exhibits 3205 and 2917; has the Dewey Company, Mr. Moore, ever used—I will show you these exhibits, and ask you to look at these capacities for districts 7 and 8. I think they appear in Exhibits, Commission's Exhibits 2917 throughout.

A. These exhibits, Commission's Exhibit 3205, that I have, do not show from the headings that it is a daily capacity. Is that what this is supposed to be?

Q. Well, I do not know. Those exhibits, as I take it, purport to set forth the capacities of the Dewey plant. Will you tell us—

Mr. Wooden: I think they are on a year.

Mr. Seeley: Excuse me.

Mr. Wooden: I think they are on a yearly basis.

By Mr. Seeley:

Q. Well, tell us, Mr. Moore, has the Dewey Company ever used the capacity figures set forth in those exhibits in planning its operating schedules?

A. No, sir.

Q. Or for any other purpose, to your knowledge?

A. No, sir, not to my knowledge.

Q. Well, to your knowledge, has the company ever had any agreement, or understanding as to the amount of cement, either clinker or finished cement, that it would produce?

46734 A. No, sir.

Q. Tell me, Mr. Moore, you told us Friday, what your qualifications were and what experience you had had with the company,—if the company, if the Dewey Com-

pany, during the time you have been with it, had any such agreement, would you know of it?

A. Well, I feel sure that I would because I am secretary of the company, and present at all the meetings of the Board of Directors, and stockholders, and I do not think I have missed but one meeting since I became secretary in 1924.

Those things, it seems to me, certainly would be discussed at those meetings.

Q. And finally I have one question, how has the Dewey Company determined its rate of operations, if you know?

A. Yes, I know. It has been determined entirely by considering the stocks on hand and the probable futures demand.

Q. Whose stocks on hand?

A. Our stocks on hand at our mills.

Q. And has the company ever adjusted the rate of operations to any percentage of its capacity?

A. No, sir.

Q. There is one other. Well, there is a series of exhibits here. I just want to ask you one question 46735 about them, Mr. Moore.

Does the Dewey Company, or has the Dewey Company ever had any regular period of shut down?

A. No, it is all dependent upon the business we are able to do.

Q. Has the company made any attempt or effort to operate continuously?

A. Yes. We try to operate as continuously as possible, that is the way we get the lowest production costs.

Q. I showed you, a moment ago, this exhibit, Commission's Exhibit 2917. Do you recall a so-called plan for sharing available business during the N. R. A. Code?

A. Yes, sir. I recall some such plan.

Q. And did the Dewey Company give any consideration to that plan?

A. Well, not very much. We never thought it was feasible or that it would work. It was discussed in our offices, and between myself and the various other officers.

Q. And you say it was discussed. What was the purpose or object of your discussion; what did you understand?

A. Well, we understood that that was something that was likely to come into effect under the Code, therefore, we had to give it consideration.

Q. Did the Dewey Company operate on any quota or any other scheme of production during that period?

46736 A. No, sir, only supply and demand for our own product.

Q. Or at any other time?

A. No, sir.

Q. Has the Dewey Company, to your knowledge, ever used any so-called three largest months of production formula in estimating capacity?

A. No, sir, it has not.

Q. I have just one more question, now, Mr. Moore, before we leave this topic.

Do you know, during the time you have been with the company, has there ever been any allocation of business in your territory?

A. No, sir, not to my knowledge.

Q. Showing you, Mr. Moore, Respondents' Exhibit 3602-A and B, can you tell us what those papers are?

A. Respondents' Exhibit 3602-A is a statement showing the barrels of cement produced at our Dewey plant by months, and the years 1927 to 1939, inclusive; Exhibit 3602-B is a similar statement for the same period showing production of the Davenport plant.

46737 Q. Under what circumstances were these prepared, were these papers prepared?

A. Prepared in the general office at Kansas City, under my personal direction.

Q. Are these made from current business records which you have in your office?

A. Yes, sir.

Q. And can you vouch for their accuracy?

A. For the accuracy of these statements?

Q. Yes.

A. Yes.

46749 Q. Mr. Moore, can you tell us whether, prior to becoming a member of The Cement Institute, the Dewey Company subscribed to any statistical service of W. S. Mallory? I refer to Commission's Exhibit 3008-A?

A. It did.

Q. Can you tell us whether the executives, the management of Dewey Company knew who the other subscribers were in subscribing to that service?

A. Well, I did not, and as far as I know, the other executives did not.

46750 Q. Tell us, Mr. Moore, what did you understand as to the source and nature of this service, at the time that you subscribed to it.

A. I understood it was a service that Mr. Mallory had of his own, and he came out to Kansas City and interviewed several officials, including myself and the president of the company, and we understood it was something that Mr. Mallory was, had as a business all his own.

Q. Well, what use, if any, did you make of the
46751 service of Mr. Mallory, of the Dewey Company I am talking about now?

A. Well, it used the forecasts to inform itself of the probable demand for cement in the territories where we were operating.

Q. Well, did you have any other information on this subject?

A. Do you mean make any further use of it?

Q. No, did you have any other information on the subject?

A. Well, we had similar information from the Bureau of Mines' reports, but the Mallory reports were generally earlier than the Bureau of Mines' reports, and therefore valuable for that reason.

Q. Was there any other use that you made of the Mallory service at that time?

A. Well, yes. I was a member of the Trans-Missouri-Kansas Regional Advisory Board, operating—which was an association of shippers of all kinds of commodities in the so-called Trans-Missouri-Kansas territory of the railroads, which was an organization of shippers formed to assist the railroads in studying and forecasting the possible car and equipment needs of the, that section of the country, and as chairman of the Cement section of that Board, I used the Mallory reports along with reports of Dun and Bradstreet, and other Governmental reports, as well as construction plans of the various states for highways that would require cement, all the data I
46752 could to report to the Board quarterly in advance on the probable car requirements.

Q. Did you or did you not find your Mallory forecasts of value in that connection?

A. Yes, I found it of considerable value because we went into the probable cement consumption in considerable detail, although I did not use it in toto. I did use it in

connection with numerous other sources of supply of data of that kind.

Q. You say that you were chairman of the Cement Committee of the Trans-Missouri-Kansas Regional Advisory Board?

A. Yes, I was for about ten years.

Q. What was the occasion for that, the existence or operation of that Board, and for your participation in it?

A. Well, prior to the formation of that Board annually, at various seasons of the year, there had existed severe shortages of cars and power in our section of the country. Generally, in the summer, it was a shortage of box cars when there was a heavy demand on for grain loading, and in the winter the shortage was generally in open top equipment and heavy demand for coal shipments, and there did not seem to be any progress being made to relieve that situation, complaints were continually being made by the shippers, including ourselves, to the various state commissions in those states on account of the inability
46753 to secure cars for handling our shipments, and of course, those complaints reached the railroad, and the attempt was made to find some solution, and arrange for a satisfactory car supply at the peak seasons.

The railroads thought that, they came to the shippers, and I was at the organization meeting in our district, and they told us that if we could give them an advance—

Trial Examiner Norwood: I do not think you need to go into the details about that to explain why you need those figures.

By Mr. Seeley:

Q. Well, Mr. Moore, to shorten this up, just tell us whether in that connection you used any figures on production and shipments, and stocks on hand, at the end of the month?

A. In some of my reports, I gave figures for our districts of production and shipments, stocks on hand, which figures I obtained from the Bureau of Mines' reports.

Q. Did the State Regulatory bodies take any part in the work of this Regional Board?

A. Yes, sir, they did, a very prominent part.

Q. Well, what part, briefly, will you tell us?

A. Well, of our Board, the Chairman of the Public Utilities Commission was Chairman of the Board, and

he acted in that capacity until very recent years, and
46754 the Chairman, members of the other State Commissions in the territory, were members and very active in the functioning of the Board.

The witness identified Resp. Ex. 3603 A, B and C as a printed report stating the first quarterly forecasting of anticipated freight car requirements of the United States as a whole, and by Advisory Board territories, issued by the Car Service Division of the American Railway Association of Washington, D. C., being for the third quarter of 1927.

46755 Mr. Wooden: I merely want to say this in that connection, as far as I know, we have never charged anything with regard to the use of Mr. Mallory's forecasts of general business conditions, or demand. We have never charged anything—

Mr. Seeley: You have never charged that the subscribers set forth in Commission's Exhibit 3008-A to C, were engaged in a conspiracy in connection with the use of the Mallory service?

Mr. Wooden: Why, of course not. You ought to know better than to ask that question. Don't you know
46756 what I am talking about when I say Mr. Mallory's forecasts of business conditions?

Mr. Seeley: This refers to the subscribing to the statistical service of W. S. Mallory.

Mr. Wooden: Yes. You have not everything in there. I am talking about the forecasts.

46759 The witness identified Resp. Ex. 3604 A to D as a photographic copy of the front cover, pages 9, 14 and 15, of the Official Minutes of the organization meeting of the Trans-Missouri-Kansas Regional Advisory Board held June 19, 1923; Resp. Ex. 3605 A to D as a photographic copy of a front cover, pages 10, 11 and 12, of the Official Minutes of the Trans-Missouri-Kansas Regional Advisory Board meeting held March 18, 1925.

Q. Does that exhibit, Mr. Moore, show your action as chairman of the Cement Committee, and your report to the Board?

A. Yes, sir.

Q. Does that report contain the figures on shipments and stocks on hand, and production, which you incorporated or which you used in connection with this work?

A. Yes, sir, as of the time of this report.

Q. And what is the relationship, in time, if any, between this Respondents' Exhibit and 3603-A to C,
46760 for identification, and the exhibit which you have just described?

A. Well, Exhibit 3603-A to C, inclusive, is nearly two years after the time of the meeting represented by Exhibit 3605-A to D, inclusive.

Q. Well, did you or did you not continue to use the Mallory service after that date?

A. Yes, I continued to use the Mallory service for this purpose, as long as I was able to get the reports, or as long as I was Chairman, whichever expired first.

Q. Well, has the Dewey Company received this service from Mr. Mallory subsequent to the termination of its subscription to the Mallory service?

A. No.

Q. What date did your answer pertain to, Mr. Moore?

A. I thought you meant 1927.

Q. Yes, and your answer is that you did?

A. Yes, sir.

Q. And did you use it in the same way, or in a different way from which you described?

46761 A. In the same way.

Q. Now, with reference to Respondents' Exhibit 3604-A to D, will you tell us whether any railroad representative had any vote in the proceedings of the Regional Advisory Board?

A. No, they did not.

Q. I have one question now, before I am through, and I am going to offer these papers in evidence.

As of July 1, 1937, will you tell us whether the reports of the Committee of the Trans-Missouri-Kansas Board are made and issued, and if so, in what form?

A. Did you say '37?

Q. '37, yes.

A. I do not believe I understand that question, Mr. Seeley.

The Witness: Yes, they are still made and issued in the same form as they were prior, or during the time that I was Chairman of the Board. I had to resign on account of other duties, some five or six years ago, from activity in the—

By Mr. Seeley:

Q. Well, permit me to amend my question, Mr.
46762 Moore, to apply to the date on which you were last Chairman of the Board, when was that?

A. Well, as I say, it was some five or six years ago that I resigned from the Board, due to other duties.

Q. That was prior to the complaint in this proceeding?

A. Yes, sir, the same reports were made up until the time I retired from the Board, and I received the copy of the official minutes of every meeting of the Board since, and similar reports are still being made, but another party is Chairman of the Committee, and I do not know how he gets his figures.

Q. During this period we have been discussing, since 1927, did you use any figures or statistics on shipments, and, or on production or on stocks on hand, other than the Bureau of Mines' figures, which you adverted to?

A. No, that is all I used, was the Bureau of Mines' figures.

Q. And that is all?

A. Yes.

Mr. Wooden: Are these offered?

Mr. Seeley: Just the excerpts.

46764 (RESP. EXS. 3603-A, B, and C, 3604-A, B, C, and D, and 3605-A, B, C, and D, were offered and received in evidence.)

By Mr. Seeley:

Q. Mr. Moore, coming to a new topic.

Can you tell us when the Dewey Company joined the Cement Institute?

A. As I recall, it was in 1931.

Q. Well, what were the reasons, if you know, why
46765 the company joined the Cement Institute?

A. Well, we thought that the Cement Institute was to be the vehicle of cooperation between the cement industry and the Government, and following out the President's plan of increasing wages, and improving conditions in the country.

Q. Well, what period did you have in mind, now, Mr. Moore, in your last answer?

A. Well, that was the period immediately, or about 1933. Prior to that time, as far as I can recall, we did join the Institute because we thought that the information

that they would give us would be beneficial in giving us advance notice, or advance information regarding probable cement requirements similar to the information we had been receiving from Mr. Mallory.

Q. Did the Dewey Company resign from the Cement Institute?

A. Yes, sir. It did.

Q. And that is, are you speaking now of the period prior to the Code?

A. Yes, sir, as I remember it, it was in 1931, the latter part of the year, it resigned. It may have been 1932.

Q. Well, why, if you know, did the company resign from the Cement Institute, Mr. Moore, prior to the N. R. A. Code period?

A. Well, 1931, there was a bad year in the Cement industry, and as far as we were concerned, our business
46766 was very poor and our company took every means it could to reduce expenses, and that was one of the things they decided they could do without, membership in the Cement Institute.

46767 Q. Mr. Moore, did the Dewey Company drop its production of cement at either of its mills in 1930 or in 1931?

A. In 1931, the production was very materially less, I think, at both mills than it was in 1930, and it was even less in 1932, I believe, than in 1931.

46769 Q. Now, did you have any conversation with Mr. Tyler, Mr. Moore, in the month of December, 1930, concerning the falling off in production?

A. Yes, sir, we had; our annual meetings were in January each year, and at the end of the year, December, why, we always go over the results of the year in preparation for reports to the stockholders and annual meetings.

Q. Well, did you have any conversation with Mr. Tyler pertaining to reduction of expenses in the month of December, 1930?

A. Yes, sir. That is,—

46770 The Witness: We had nearly daily conferences at that time, trying to find means of reducing our expenses.

By Mr. Seeley:

Q. And did you subsequently, subsequent to these conversations, resign from The Cement Institute?

A. Yes, sir.

Q. Is the Dewey Portland Cement Company a member of the Portland Cement Association?

A. Yes, sir.

Q. How long has the company been a member of the Portland Cement Association?

A. Well, it seems like my memory goes back practically the entire time I have been with the company, twenty-eight years.

Q. Well, was there any time at which the company resigned from the Portland Cement Association?

A. Yes, sir, there was a time when the company resigned.

Q. And can you tell us when and under what circumstances the company resigned from the Portland Cement Association?

A. Well, as I remember it, it resigned from the Portland Cement Association in December, 1930, for the same reason; that is, in order to try and save expenses, and that was effective, to be effective, as I remember it, in December, 1931, I mean January 31, 1931, and that was for
46771 the account of the Dewey mill, as I remember it, the reason being that there were other mills, competitors at the time that were not contributing to the Portland Cement Association in the way of dues to maintain the efforts to try and promote and create cement business, and the company felt that, for the same reason, that that was something that we could dispense with.

Q. Did the company subsequently resign from the Portland Cement Association with respect to its Davenport mill?

A. Yes, sir, the same situation that developed in the Davenport territory, and the others were not contributing to the support of the Portland Cement Association, and Dewey felt like it should save its dues that it would otherwise have paid.

Q. Did the Dewey Portland Cement Company, subsequent to the period we have been speaking of, Mr. Moore, rejoin the Portland Cement Association?

A. Yes, sir.

Q. Under what circumstances did it rejoin?

A. Well, when it appeared that competitors were supporting the Portland Cement Association, and its activities, why, Dewey was willing to also support the Association. It has always been the attitude of the Dewey Company that

the dues paid to the Portland Cement Association were well worth the money in the development of new business.

46772 Q. Well, how, if you recall, did business conditions compare at the time you rejoined the Portland Cement Association, with business conditions as you found them at the time of your resignation?

The Witness: Well, the business conditions were better when we rejoined than they were when we resigned.

Trial Examiner Norwood: Is that the reason you rejoined?

The Witness: Yes, that was one of the reasons. We felt that we were better able to pay, and others were paying also, and the development of new business in which we hoped to share, we felt that we should go along.

Trial Examiner Norwood: Had the service fallen off when you resigned before?

The Witness: You mean the shipments, the business?

46773 Trial Examiner Norwood: No, the service of the Association to you?

The Witness: Why, yes, it had because many of the field men had been withdrawn from the territories in which we operated, and we were not getting as much from what we paid as dues as we thought we should have.

By Mr. Seeley:

Q. Mr. Moore, did the Dewey Portland Cement Company, to your knowledge, have any agreement with their competitors, or with any competitor, concerning base prices in connection with its rejoining the Portland Cement Association?

A. Not to my knowledge.

Q. Can you tell us, or do you recall the time when the Dewey Company rejoined the Portland Cement Association?

A. Yes, I think it was in late 1932.

Q. Mr. Moore, with respect to joining the Portland Cement Association, did the Dewey Portland Cement Company have any agreement or understanding, to your knowledge, with any of its competitors that it would or would not belong to the Portland Cement Association?

A. No, sir, not to my knowledge.

46774 Q. Mr. Moore, has any of the officers or employees of the Dewey Company ever been an officer or trustee of the Cement Institute?

A. Not that I know of.

Q. Has The Cement Institute, to your knowledge, ever formulated or interpreted any matter of policy for your company?

The Witness: No, sir.

46775 Q. Well, tell us, Mr. Moore, have you, or so far as you know, any one of the management of your company, ever understood or considered that it was the function of The Cement Institute to interpret or formulate marketing policies for your company, or for any other company?

A. No, sir.

Q. Showing you, Mr. Moore, Respondents' Exhibit for identification 3608, can you tell us what that is?

A. That is an original letter dated May 19, 1933, addressed to Dewey Portland Cement Company, Kansas City, Missouri, attention Mr. F. E. Tyler, president, signed by G. F. Coffin, treasurer and general manager of the Nazareth Cement Company.

Q. Are you familiar with the body of this letter, the subject matter, where does it come from, if you know, Mr. Moore?

A. Do you mean the letter?

Q. Yes.

A. Why, it comes from the official files of the company.

Q. Well, are you familiar with the subject matter?

A. Yes.

Q. Well, can you tell us whether this is the understanding which your company had when it joined The Ce-
46776 ment Institute in 1933?

A. Yes, sir.

46778 By Mr. Seeley:

Q. Mr. Moore, you told us on Friday that your company sells its products at delivered prices. How long has that been the case, Mr. Moore?

A. Ever since I have been with the company, twenty-eight years, possibly prior thereto, but I do not know.

Q. Well, what has been your experience, Mr. Moore, as to—tell us what are the reasons, if you know, why the company sells its products at delivered prices?

A. It tries to get all it can for its products, is the main reason.

Q. Well, what have you found as to the market for your product?

A. The market is at the destination.

Q. Well, what kind of prices have your customers requested, if they have requested?

46779 The Witness: The majority of them have requested prices at the destination where the cement was to be used. Some have requested prices at the mill, such as railroads, and the Government, in some cases.

By Mr. Seeley:

Q. Has the Dewey Company, to your knowledge, ever had any agreement or understanding with any competitor or with anyone outside of your company, to sell its products at delivered prices?

A. No, sir.

Q. Well, has your company met prices of competitors at destination since you have been in the company?

A. Yes, sir, we endeavor to do it.

46780 By Mr. Seeley:

Q. Does it make any difference, Mr. Moore, whether these prices of competitors which you find appear to reflect any mill base, or did not appear to reflect any mill base?

The Witness: No, sir, it makes no difference.

By Mr. Seeley:

Q. Has the Dewey Company had any agreement to quote prices that reflect a lower combination of any mill base plus freight?

A. No, sir.

Q. Well, has the Dewey Company had any agreement or understanding to quote a price which is identical with a competitor's price?

A. No, sir.

46783 Q. What has been the policy of the company, Mr. Moore, with respect to the return of freight bills by the customers?

A. It has always insisted that freight bills be returned, for credit.

Q. You say "always"?

A. I mean,—since I have been with the company.

Q. And why, if you know?

A. Yes. The shipments were sold delivered at destina-

tion, and the customer was permitted to pay the freight charges for the account of the company, sent the freight bills in for credit, the same as so much cash, and unless he sent his freight bill in, why, his account remained open to that extent, the amount of the freight on the shipment.

46788 Q. Mr. Moore, will you tell us what has been the policy of your company with respect to the handling of its customers' accounts on sales of cement?

A. The policy has been to charge the customer with the gross value of the cement and sacks at destination, and to credit the customer's account for any freight charges that he may pay on such shipments, and to reimburse the customer for any cloth bags that he may return for credit.

Q. And what has been the Dewey Company's pol-

46789 icy in respect to freight bills paid by the consignee?

A. He is given full credit for the amount of freight he pays when he sends it in as part payment with remittance.

Q. And has the company made any effort to have those freight bills returned, those paid freight bills returned to the company?

A. Yes, sir. We have a follow-up system where, if the customer should remit without sending in the freight bills, he is immediately written and urged to send the freight bill in for credit, and we keep after him until we either get the freight bills, or have to give up in final disgust or dismay, but that is not very often.

Trial Examiner Norwood: Why do you want the freight bills?

The Witness: Because the shipments are sold delivered at destination, and we feel that the shipments are ours until they are delivered to the customer.

In the event of claims of overcharge, or loss, or damage, why, the freight bill is a necessary document to have to support that claim.

By Mr. Seeley:

46790 Q. You said, Mr. Moore, that you felt, your company felt that the goods were yours until they were delivered to the consignee.

How long has that been?

Q. Your attitude?

A. Twenty-eight years, that I know of.

Q. Did you, did your company give any notice to that effect to the trade?

A. Yes, sir.

Q. And in what way?

A. In the form of formal announcements, and further, in our quotation forms, and invoice forms, contract forms.

Q. How long have you been doing that?

A. Ever since I can recall.

46791 Q. Mr. Moore, showing you Respondents' Exhibits for identification 3610-A to C and 3611-A to F, will you tell us what those are?

A. Respondents' Exhibits 3610-A to C is file copy of one of our loss and damage—no, one of our overcharge claims filed on August 1, 1925, covering a shipment from Dewey, Oklahoma, to Hollis, Oklahoma, made on June 25, 1925. Respondents' Exhibit 3610-B is a copy of the freight bill covering the shipment; 3610-C is a letter from, it is a debit memorandum from the customer, the Cicero Smith Lumber Company, notifying us of the debiting of the amount of freight that they paid on the shipment, which was $10.03 more than our invoice had indicated was the correct freight.

Respondents' Exhibit 3611-B is a copy of one of our loss and damage claims covering a shipment from Dewey, Oklahoma to Kansas City, Missouri, on July 13, 1925.

Respondents' Exhibit 3611-A is an acknowledgment from the freight claim agent of the Missouri-Kansas-Texas

46792 Railroad acknowledging receipt of the claim.

Respondents' Exhibit 3611-C is a letter from the customer at Kansas City, enclosing the debit memorandum.

Respondents' Exhibit 3611-D is a charge memorandum from the customer for the amount that he was claiming.

Respondents' Exhibit 3611-E is a copy of the invoice covering the shipment.

Respondents' Exhibit 3611-F is an affidavit of an officer of the consignee certifying to the damage, loss to the shipment.

Q. Can you identify Respondents' Exhibit for identification 3609-A to D?

A. Exhibit 3609-A is a request from a customer at Marion, Kansas, for a quotation on cement dated May 25, 1937.

Respondents' Exhibit 3609-B is the reverse side of the request for the quotation.

Respondents' Exhibit 3609-C is a letter from M. E. Gillioz, Inc., Monett, Missouri, to the Dewey Portland Cement Company, Kansas City, requesting a quotation on cement for delivery, f.o.b. car at Keytesville, and Salisbury, Missouri, dated April 20, 1937.

Respondents' Exhibit 3609-D is original letter from Hunter Lumber Company, Chillicothe, Illinois, dated August 24, 1929, addressed to the company at Davenport, Iowa, asking for delivered prices on cement for all
46793 the yards they owned.

Q. Can you tell us whether M. E. Gillioz, what kind of a customer he is?

A. Contractor.

Q. What kind of customer is the Hunter Lumber Company?

A. Dealer.

Q. And who is G. Wynn, what kind of customer is that?

A. Dealer.

Q. Are these letters typical or not typical of the requests that you have from your customers?

A. They are typical.

Q. And does your answer pertain to the whole period you have been with the company?

A. Yes, sir.

Mr. Seeley: In view of your Honor's ruling on this matter, I am not offering these letters from customers requesting prices at destination.

I will note that your Honor has heretofore denied us the right to offer in evidence any such, any more of such letters of such description.

Trial Examiner Norwood: Yes.

46794 Q. Mr. Moore, does the Dewey Portland Cement Company guarantee delivery of its goods?

A. Yes, sir.

Q. And how long has that been so?

A. Ever since I can recall.

Q. What has been the practice of the Dewey Company in respect to claims for credit by customers for loss or damage?

A. It has been our practice to file the claims for our own account and credit the customer's account.

Q. When do you credit the customer?

A. Generally, when the necessary documents are received from the customer, indicating that he has a claim;

that means the freight bill with the proper notation on it of shortage or damage, or, if he has not been able to obtain such a notation, then an affidavit supporting his contention that he has a claim for loss or damage.

Q. Has the Dewey Company, in its invoices or in any of its forms given any notice to its customers concerning loss of cement in transit?

A. Yes.

46796 New York, New York,
Tuesday, October 22, 1940.

46800 DEWEY T. MEYERS was thereupon recalled as a witness for the Respondents and, having been previously duly sworn, testified as follows:

Direct Examination by Mr. Smith.

Q. Mr. Meyers, were you asked to prepare a map indicating the limits of the territory in which the several mills would distribute their cement on the assump-
46801 tion, based on rail rates, on the assumption of a uniform mill price for each mill?

A. Yes, sir.

Q. And is this paper that I am now showing you that map?

A. That is the map.

Mr. Smith: I would like to have that marked for identification as Respondents' Exhibit.

(The map referred to was marked "Respondents' Exhibit 3612," for identification.)

Mr. Smith: I would like to have this paper marked as Respondents' Exhibit for identification.

(The document referred to was marked "Respondents' Exhibit 3613," for identification.)

By Mr. Smith:

Q. I am showing you Respondents' Exhibit 3613. Is that a list of the railroad tariffs that you used in making up that map?

A. Yes, sir.

Q. The are all I. C. C. tariffs, and the numbers are noted thereon, are they not, Mr. Meyers?

A. With the exception of one.

Mr. Smith: I would like to have this marked as Respondents' Exhibit for identification.

(The documents referred to was marked "Respondents' Exhibit 3614-A, 3614-B, 3614-C, 3614-D," for identification.)

46802 By Mr. Smith:

Q. Respondents' Exhibit 3614-A to D, which I show you, Mr. Meyers; is that tariff a tariff of the Pere Marquette Railway Company filed with the proper authority in Michigan but not with the I. C. C.; is that true?

A. That was filed with the Michigan Public Service Commission under Pere Marquette No. 4670.

Mr. Smith: I would like to have this marked as Respondents' Exhibit for identification.

(The document referred to was marked "Respondents' Exhibit 3615-A and 3615-B," for identification.)

By Mr. Smith:

Q. I show you Respondents' Exhibit 3615-A and B. Is that a description of the groups as they appear on the map?

A. That is a description of the groups on the map.

Mr. Smith: Will you mark this, please, as Respondents' Exhibit for identification?

(The document referred to was marked "Respondents' Exhibit 3616-A, 3616-B, 3616-C, 3616-D, 3616-E, 3616-F, and 361-G," for identification.)

By Mr. Smith:

Q. In Respondents' Exhibit 3116-A to G, that list the shipping points in each group, and the shipping points in contiguous territories?

A. Yes, that is true.

46803 Q. The points between which would furnish the information on which you built your line of demarcation?

A. Yes.

Mr. Smith: Well, I offer the map, Respondents' Exhibit 3612, the list of tariffs from which we derived the information, Respondents' Exhibit 3613, and Respondents' Exhibit 3614, the Pere Marquette Railroad tariff, and Respondents' Exhibit 3615-A and B, the description of the

groups, and Respondents' Exhibit 3616-A to G, the lists and the various shipping points whose shipments on railways would meet on the lines in the map.

Your Honor, I am quite sure that so far as the respondent, Huron is concerned, the information is now in the record which would make possible a statement of fact as is presented by the map. There is no comprehensive statement even on the tariffs in the record on which this map is built, and no information from which we could argue that in case two mills somewhat contiguous made the same price, their distribution territory would be limited as is exhibited on the map.

Trial Examiner Norwood: Well, that principle would apply to other mills, would apply generally just as much to Huron; wouldn't it?

46804 Mr. Smith: The same principle, of course, is one purpose of our offer.

Trial Examiner Norwood: And the same principle has been shown with respect to other mills, and the Huron has a stipulation in the record that if they adopt or take advantage of that territory, and any mill, if that is found to be true, it is bound to be applied to your client, and there is abundant information on the subject already in the record.

Mr. Smith: Well, I do not want to press it, your Honor, but just let me add this one word, for instance, assuming that condition was in existence, here is one group here, Coldwater Mill in Michigan, Group 26, would be limited to a territory, roughly, fifty miles from its base. It could not get out, could not get its cement out anywheres else. The Alpina Mill proper would be limited to about a similar territory.

Here is a mill down here in Southern Ohio, and they would have a radius of about twenty miles that they could distribute any cement.

Assuming a mill like that had two million capacity a year, it might be able to distribute three hundred thousand, two or three hundred thousand barrels.

Trial Examiner Norwood: You assume they can't

46805 meet competition by reducing its rate in price?

Mr. Smith: Oh, I would not, that would be the next step in our argument.

Trial Examiner Norwood: Well, that is part of the assumption.

Mr. Smith: Probably it could meet competition, but this map shows the basis on which it would start, it would have to modify its plant price, of course.

Trial Examiner Norwood: If it could meet competition, it would not be confined to that fifty miles there, would it?

Mr. Smith: No, but this exhibits what would be the situation from which it would start its program of selling. It could reduce its price, and then it would spread these lines, but it is a part of our argument, at least, that they would be driven to a uniform price, only a few of them could reduce the price to spread their distribution into the territory very distant from the point of production, so I hope your Honor will not reject it, because I think it is of value in the study of the whole problem.

Trial Examiner Norwood: Do you offer those in evidence now?

Mr. Smith: Yes, I offered them.

Trial Examiner Norwood: The Respondents' Ex-
46806 hibits 3612 to Respondents' Exhibits 3616, inclusive; is that right?

Mr. Smith: That is right.

Mr. MacIntyre: We would like to ask the witness a question or two on voir dire, so whether they are accepted or rejected, the record will at least be clarified as to what these show.

We believe the record is not clarified at the present time.

Trial Examiner Norwood: Go ahead.

Examination on Voir Dire by Mr. MacIntyre.

Q. Mr. Myers, showing you Respondents' Exhibit for identification, 3612, the different colored areas on that map which show the limits of shipping; that is, the shipping limits of one mill as against another, is based merely on the freight advantage, railroad freight advantage of one mill against the other; is that correct?

A. Railroad rates, yes.

Q. And merely railroad freight rate advantage of one mill against the other?

A. That is right.

Q. And it takes into account nothing with respect to the level of a price even if it be a uniform f.o.b. mill price

at one point higher or lower than a uniform f.o.b.
46807 mill price, I mean a uniform mill price at another point; is that correct?

A. I do not believe I quite follow you, Mr. MacIntyre.

Mr. MacIntyre: Will you read the question, please?

Trial Examiner Norwood: Read the question.

(The question referred to was read by the reporter.)

By Mr. MacIntyre:

Q. In other words, nothing like that is taken into account in connection with the making up of this map?

A. No, it is not.

Q. And, you did not take into account any possibility of a variation in a mill price at any particular point, did you?

A. No.

Q. As to the advantage one mill would have in meeting the competition of another?

A. No, this is strictly uniform, in other words, these are rate breaking lines of demarcation.

Q. And only that?

A. And only that.

Q. And the same thing is true with respect to the showing that is made by respondents' Exhibits for identification 3613, 3614, 3615, and 3616?

A. Yes, those exhibits are supplemental of the map.

Q. And are based upon the same assumptions
46808 and suppositions as the map, itself?

A. That is right.

Mr. MacIntyre: That is all.

We object to the offer as irrelevant and immaterial.

RAYMOND W. MOORE resumed the stand and testified further as follows:

Direct Examination by Mr. Seeley (Continued).

Q. Mr. Moore, yesterday His Honor directed us to proceed with the proof which we had offered to make in connection with the policy of the, or with respect to the policy of the Dewey Portland Cement Company, so far as it concerns the sales of cement to customers and the handling of claims of customers for loss or damage in transit.
46809 The witness identified Resp. Ex. 3610 A to C as papers representing the file of Dewey covering this

statement of claims for overcharge on freight; Resp. Ex. 3611 A to F as the Dewey file covering the handling of claims for loss or damage in transit. Regarding the
46810 overcharge claim (Resp. Ex. 3610-A to C) Dewey remitted the claim for overcharge, or credited the customer, two days after the claim was filed and credited the customer's account before the company received the reimbursement from the railroad. With respect to the other exhibit, dealing with the loss in transit, (Resp. Ex. 3611 A to F) Dewey credited the customer's account two days after the claim was filed and before the claim was paid by the
46811 railroad. Those papers represent practice of Dewey at that time on such transactions and it has been the practice since witness has been with the company in 1912. There has been no change in the practice of Dewey with respect to handling the claims for overcharge or the claims for loss or damage in transit since the date of these papers; Resp. Ex. 3618 is a pamphlet, one of a monthly series, issued by Dewey; Resp. Ex. 3617 as a photographic copy of pages 8 and 9 of Resp. Ex. 3618. Resp. Ex. 3618 is the source of Resp. Ex. 3617. Resp. Ex. 3618 is Dew-
46812 ey's notice to its trade. The date of the notice does not appear, but it was shortly after the Interstate Commerce Commission had issued rulings regarding the filing of both overcharge and loss and damage claims and he believes that this was sometime before 1920; Resp. Ex. 3617 as a notice to the trade, written by him, containing instructions as to what Dewey would expect from its customers in the way of supporting documents for claims for both overcharge and loss and damage. He is the au-
46813 thor of this page and document.
46815 (RESP. EXS. 3610-A, 3610-B, 3610-C, 3611-A, 3611-B, 3611-C, 3611-D, 3611-E, and 3611-F, and 3617 were offered and received in evidence.)

By Mr. Seeley:

Q. Mr. Moore, looking at these Respondents' Exhibits in evidence, 3610-A to C, and 3611-A to F, in particular looking at these sheets 3610-A and 3611-B, do those sheets represent the form which the Dewey Company used
46816 in making such claims or claims of that character?

A. Yes, sir, they have those forms.

Q. And I want to know whether the Dewey Com-
46817 pany have been using the same forms, or different forms, or whether there was not a modification in

these forms since the date of these documents, or since the date of Respondents' Exhibit 3617?

A. It is still using the same forms.

Q. And this form was drafted by you?

A. Yes, sir.

Q. Now, since you have been handling claims of this character since you have been with the company, have the claims made by the Dewey Company to the railroad been made—

Well, tell us in whose name they have been made.

A. They have all been made in our own name, and they have been paid to us or rejected in the case where we are unable to convince the railroads that our claim was bona fide.

Trial Examiner Norwood: Do you have cases where you failed to recover?

The Witness: That is right.

Trial Examiner Norwood: With reparations from the railroad, and you have taken the loss?

The Witness: Yes, sir.

Trial Examiner Norwood: And have not charged it back to the customer?

The Witness: That is correct.

By Mr. Seeley:

Q. Now, Mr. Moore, we were discussing last 46818 night at the close of the hearing, the clause which you testified about with reference to Commission's Exhibit 2677-1 to 79, I will ask you again, Mr. Moore, whether the Dewey Company has had any clause in its forms, quotations, or other forms with respect to loss or breakage of paper sacks in transit?

A. Yes, sir, we have a clause in our quotation forms, and invoices, stating that the company would not pay—

Q. Does the clause to which you adverted, Mr. Moore, pertain to the subject of loss or damage to sacks, to paper sacks in transit?

A. Cement in paper sacks, yes.

Q. Cement in paper sacks, and in practice I want to know what has been the practice of the Dewey Company with respect to that clause—well, first, I will ask you if I may, who drafted that clause, if you know?

A. I did.

Q. And what was the purpose and intention of that clause?

A. The intention and purpose was to induce the customers to be more careful in the handling of cement in paper bags, the paper bags being more susceptible to breakage than cloth bags.

46819 Q. Well, in actual practice, has the Dewey Company adhered to the terms of that clause or not?

A. No, sir, it has not.

Q. And when was that clause drafted by you, could you tell us?

A. Well, I cannot tell you the date, prior to 1920.

Q. It was prior to 1920?

A. Yes, sir.

46826 Q. Now, Mr. Moore, as of July 1, 1937, how many, if you know, how many cement plants were operating in the so-called gas belt which the Dewey Company found selling in its markets?

A. Five, besides our own.

Q. And how did that compare with the number of plants situated in the so-called Kansas gas belt, which the Dewey Company found selling in its markets, when

46827 you came with the company?

A. There were twelce at that time.

Q. Do you know of your own knowledge, during that period from 1912 to 1937, whether any of the mills situated in the Kansas gas belt suspended operations or were discontinued, or dismantled?

A. Yes, sir.

Q. Well, just tell us what you know about it.

A. I know that during that time the Lumbermen Cement Company at Carlisle, Kansas, suspended operations, went out of business, and the plant was dismantled. The same thing happened in regard to the Altoona Portland Cement Company at Altoona, Kansas.

The same thing happened with regard to the three plants of the United Kansas Cement Company, one located near Iola, Kansas, the second at Fredonia, Kansas, and a third at Independence, Kansas.

The same was true of the Chanute Cement Company at Chanute, Kansas.

The same was true with another plant in Kansas and not in the gas belt, at least, I never heard of it, but it appeared in the reports of the U. S. Geological Survey as being located, I believe, at Mapleton, Kansas, and was supposed to have been in operation for two years during that period.

46828 The same is true of the Western States Portland Cement Company of Independence, Kansas. It did not go out of business, however. It sold out.

The same is true of the Great Western Portland Cement Company at Mildred, Kansas. It sold out and the purchaser of the plan dismantled it. I think that is the principal plants that have been dismantled in that period of time in the gas belt.

Q. Well, during that period of time, since you were with the company in 1912 until, I think you told us, in 1925, was the Dewey Company, with respect to its mill at Dewey, Oklahoma, increasing or decreasing its capacity?

A. It was greatly increasing its capacity.

Q. And do I understand, that is during this same period in which these mills were going out of business?

A. Yes, sir, it was.

46829 Q. Both as to the five mills which you say you found doing business in your market as of today, and the other, twelve mills, which you say you found doing business in your markets when you came with the company.

A. Yes.

Q. During those intervening years, I want to know what was that experience? Did you find those mills competing with the Dewey Portland Cement Company, or not, in those markets?

A. Yes, sir. We found they did compete with us. We had the same freight rates, to all markets excepting nearby points, and they were competing with us.

Q. Does your answer apply to the mills which you say were dismantled, as well as to the mills which you now find in competition with you?

A. Yes, sir.

Q. That is, mills which are now operating?

A. Yes, sir.

46830 The Davenport, Iowa, plant was built in 1926-1927. I was familiar with the general demand in Iowa, Illinois, Wisconsin and Minnesota prior to

46831 1926. I knew that the demand was exceptionally good, and on the increase. As a director of the corporation at the time the Davenport plant was built I can say that the following factors were considered in building that plant: (1) the market available; (2) supply of raw materials. That, in 1936, was proved by Ford, Bacon and Davis to be ample at the current rate of use for a period

of 500 years; (3) location on the Mississippi River, which gave us a splendid water supply; (4) potential transportation facilities of the Mississippi River; (5) location of two large railroads which are the Chicago, Rock Island & Pacific and the Chicago, Milwaukee, St. Paul & Pacific; (6) the close proximity to a large consuming area, known as the "Tri City District" comprising three large cities in that close area, Moline, East Aurora, "and —

46832 There is one additional and important item to which we gave consideration, and that was the fact that throughout that territory that would be the trade territory of such mill, the Interstate Commerce Commission had established a uniform basis of freight rates on cement. We knew, by working out the application of that basis from our Dewey mill, what our basis would be from our

46833 Davenport mill, if we built at Davenport, Iowa. This was an advantage inasmuch as Dewey knew what to expect in the way of freight rates on which to operate in order to meet competition and this enabled Dewey to know what its transportation costs would be.

The mill at Davenport, Iowa, is within the switching limits of Davenport, Iowa. It is located at Linwood, which is a station within the switching limits of Davenport. Dewey built a wet process plant there. The mill at Dewey, Oklahoma, is a dry process plant. In constructing this fill, (at Davenport) large units were put in because they bring about lower production costs.

46836 By Mr. Seeley:

Q. And also those four years prior to the time—

Mr. Wooden: I object. I object. That is four years prior to the time that this witness went with the company.

Trial Examiner Norwood: Yes. He cannot testify to that.

46837 By Mr. Seeley:

Q. Mr. Moore, can you tell us, or, first, do you know why, at the time you came with the company, do you know why the company was furnishing statistics to the Bureau of Mines?

A. Yes, sir.

Q. What were the reasons?

Mr. Seeley: I refer, for Your Honor's information, and for Mr. Wooden's benefit, I am referring to Commission's Exhibits Nos. 3235, 3236 and 3237.

Trial Examiner Norwood: Proceed.

The Witness: The company had received a request, or was receiving requests monthly for reports to be made to the United States Geological Survey.

The company felt that it was desirable to make such reports because, in return, it received reports and documents issued by the United States Geological Survey.

By Mr. Seeley:

Q. Mr. Moore, does that answer as to the reasons why the company furnished statistics to the Bureau of Mines at the time you came with the company, apply to the period since that time, or to part of it, and, if so, tell us
46838 what is your answer?

A. Well, we have continued to make reports, as requested by the Bureau of Mines, continuously since 1912.

Q. For the same reasons?

A. Yes, sir for the same reasons. Yes, sir.

Q. Mr. Moore, referring back, for the moment, to the Bureau of Mines report, which you say, you, in return, received from the Government; what use, if any, do you make of those reports which you receive from the Government?

A. Well, we receive reports on shipments into states, by months, and by years, which are compared with shipments for the previous year, or for the same period of time, and that gives us a splendid idea of the trend in the consumption in those states.

It also gives information of production and shipments of sacks, by districts. It gives us an idea of what the districts are in which our plants are located, or whatver plants there are, as a rule, are doing.

Q. Will you elaborate that answer just a little more, the last part of it?

A. I say, it also gives information as to the production and shipment of sacks, by districts. It gives us an idea of what the districts in which our plants are located, as a whole, are doing.

Q. Oh, thank you. On what occasion do you use those figures?

A. Well, they are used in connection with our continuons study as to the probable operating periods of the plants, and probable demand.

Q. Do you make any compilations, based on the 46840 total shipments, shown in those figures?

A. Yes. We keep a close record; that is, a continuing monthly record showing the shipments, and these data that I have referred to.

Q. Is that; these data, the basis of the studies and statements on which the Dewey Company has made shipments of cement, just for itself, or is it a broader picture based upon the Bureau of Mines' reports to you?

A. It is based upon the Bureau of Mines' reports, indicating the shipments of cement.

Q. I mean by that question, in order that the record may be clear, these data that you have referred to, is information secured from the Bureau of Mines' reports which you receive?

A. Yes. It is based on all the information that we can get from anywhere. Primarily, the Bureau of Mines' reports, I should say.

Q. Does your sales department make any use of that information?

A. Yes, sir. They plan their sales programs in much the same way as we plan our operating programs, on the probable demand.

Q. Did you, or, as far as you know, does the Dewey Company now, or has the Dewey Company ever used any statistics of the Bureau of Mines, or any other statistics to allocate business or regulate production?

46841 A. No, sir. Not to my knowledge.

Q. You spoke yesterday of statistics of the Cement Institute. Has there been any difference between the use which the Dewey Company made of the Bureau of Mines statistics, and that which it made of the Cement Institute statistics?

The Witness: There is no difference.

Q. During such time as you have used the statistical service of the Cement Institute, did you find it of any, or, first, how did you find its value as compared to the service of the Bureau of Mines, or the reports of the Bureau of Mines?

46842 A. We generally get the statistics of the Cement Institute ahead of those from the Bureau of Mines.

To the extent that we did receive them in advance, it was helpful, because we were anxious to learn, as far in advance as possible, what the probable demand would be.

Q. Did you attempt to ascertain what the demand was as to location; where the demand it; that is, as well?

A. Oh, yes. We attempt to ascertain where the demand is as well. That is very important.

By Trial Examiner Norwood:

Q. The Bureau of Standards' figures, does it give you that?

A. The Bureau of Mines. It gives it by states, your Honor.

Q. Are the Institute figures more definite?

A. No more definite. They are substantially the same figures.

Q. Substantially the same?

A. Except that we get them earlier.

Q. They come to you more quickly?

A. Yes, sir.

By Mr. Seeley:

Q. Tell me, Mr. Moore, can you state whether or not the company has ever; and I mean the Dewey Portland Cement Company, has ever concerned itself, during your period with the company, with statistics outside of your sales territory?

A. No, it has not, to my knowledge.

46843 Q. Does the company, or has it ever made any use of clinker statistics?

A. No.

46845 Q. You mentioned a pamphlet of cost accounting. That was issued by whom?

A. The Federal Trade Commission.

Q. It was contained in a speech of Mr. Hurley's?

A. Yes. It was contained in a speech of Mr. Hurley.

Q. Who was Mr. Hurley?

A. He was chairman of the Federal Trade Commission, and was speaking as such.

Q. Did that speech make any reference to reports and statistics?

A. Yes, sir.

Q. What did it say, if you recall? Just what was the tenor of it with respect to statistics?

46849 The Witness: Yes. The Federal Trade Commission recommended statistics, yes. The Federal Trade Commission recommended that.

46853 By Mr. Seeley:

Q. I do want to know one more thing, Mr. Moore: was the Dewey Portland Cement Company, to your knowledge, influenced, or was it not influenced by the statements to which you have referred of the Federal Trade Commission, concerning statistics and the use of them?

A. It was influenced by them.

Q. Mr. Moore, coming back to a new topic—before I do that, Mr. Moore, I think you told us that you reported the figures to the Bureau of Mines, since how long?

A. 1908.

Q. And since you have been with the company?

46854 A. They have been reporting since 1908, when I came with the company.

Q. Subsequently, did they continue to do so?

A. Yes.

Q. Subsequent to these speeches and publications of the Federal Trade Commission, did you continue to report statistics?

A. Yes, sir.

Q. Do you still do so?

A. Yes, sir. We still do. We have continuously done so, without interruption.

Q. In so doing, you say you were influenced by these speeches and publications; were you?

A. Oh, yes. We were very much impressed by them.

Q. Mr. Moore, now, with reference to the matter of sacks.

A. Yes, sir.

Q. I now refer back to July 1, 1937; did the Dewey Portland Cement Company allow any or make any allowances to its customers on sacks returned to the company?

A. Yes, sir.

Q. I refer to bags, cotton bags, which were filled with cement by the company, and sent to the customer, and after being emptied of the cement, returned to the company.

A. That is correct.

Q. What practice did the company follow?

46855 A. It allowed ten cents for each sack returned to its mill in good condition, freight charges collect.

Q. Did you allow, as of July 1, 1937, your customers to

return those sacks for credit with freight charges collect?

A. Yes, sir.

Q. How long had that been the practice of your company?

A. Prior to that time, I do not remember the exact date, Mr. Seeley.

Q. Tell us, approximately.

A. There was a change in the Classification Rule which theretofore had provided that empty sacks could only be returned—empty cement sacks, I mean—with freight charges prepaid. When that rule was changed to permit the return of sacks with freight charges collect, then we permitted our customers to return them, "Collect."

Q. Mr. Moore, by "Classification Rule," to what are you referring?

A. The "Western Classification," issued by the Agents for the Railroads governing the application of rates on shipments of cement sacks returned.

Q. Do I understand that this Classification Rule, when it was changed, you were then permitted to permit shippers to send bags back, freight charges collect?

A. Yes, sir.

Q. Prior to that time, they were not permitted to do so?

46856 A. No, sir. They had to be prepaid.

Q. What was the situation, when you came with the company, in Western Classification territory in respect of rates for bags, for the return of sacks?

A. Oh, no. I beg your pardon. They had to be returned "freight charges prepaid." I said, "collect", but I meant "prepaid."

Q. Was there any change in that practice of your company in dealing with this matter, subsequent to the time you came with the company?

A. Yes, sir. There was.

Q. Well, what was that?

A. It developed that some of the Kansas plants were permitting their customers to return bags to them with freight charges prepaid, but were reimbursing the

46857 customers one-half of the cost of returning the bags to them, on which they had to pay rates at the full fourth class rate in order to meet the competitive situation of being able to return bags to any other mill at one-half of Fourth Class.

Q. What did you, in your company, do about that?

A. We met that situation, first, by taking the same action of remitting to our customers who had to pay the full Four Class rate, to Dewey, Oklahoma, one-half of their cost of returning the bags.

That lasted for a short time, only a matter of a few months, when another of the Kansas plants issued notice to the trade, that we learned of, that they would absorb all of the freight charges on return of bags to their plant, and that was the Western States Portland Cement Company of Independence, Kansas.

We promptly met that situation by notifying our customers that we would, likewise, absorb and refund to them the total freight charges on shipments of bags to be returned to Dewey, Oklahoma.

46858 The witness identified Resp. Ex. 3619-A as an original letter, dated July 2, 1921, written by F. L. Williamson, then vice president of Dewey, to W. E. Tyler and W. W. Fletcher. Mr. Tyler was handling the sack returns of customers at that time and Mr. Fletcher was assistant traffic manager—instructing them with regard to allowing the full Fourth Class rate.

46859 The witness identified Resp. Ex. 3619-B as a letter from Mr. Williamson dated January 30, 1922, addressed to the Dewey dealers, advising them that the company would absorb the cost of freight on the return of sacks to Dewey, Okla.

46859 Q. Mr. Moore, can you now, with these papers to refresh your memory, if these papers do refresh your memory, tell us when the Dewey Portland Cement Company made any change in its policy, the change that you referred to, of absorbing the entire cost of return?

A. This was when the changes took place, it was in 1922, or 1921. I thought it was in 1931, but I was mistaken.

Q. Is that date subsequent to or prior to the date you discovered the Western States Portland Cement Company was crediting its customers for freight prepaid on returned sacks?

A. Well, this was afterwards.

Q. You issued that notice afterwards?

A. Yes, sir. We met that situation.

(RESP. EX. 3619-A, 3619-B, was offered and re-
46860 ceived in evidence.)

By Mr. Seeley:

Q. Can you tell us, Mr. Moore, whether, with respect to the competitive situation and conditions shown by these papers, the Dewey Portland Cement Company had absorbed or not absorbed the freight on all sacks returned by its customers?

A. It has absorbed all the freight.

Q. Since that time?

A. Yes, sir.

Q. Was that still the situation as of July 1, 1937?

A. Yes, sir.

Q. How much of your business does that affect, or has it affected?

A. It has varied over the years, Mr. Seeley. When it was first inaugurated, there was very little ship-
46861 ment of cement in bulk; and a little amount of shipment of cement in paper sacks.

That picture has changed through the years, and the percentage of shipments now, in cloth sacks, are quite a bit less than they were at that time in 1921.

46866 Q. Mr. Moore, we were talking, at the close of the morning session, about the policy of the Dewey Company with respect to the treatment of freight on sacks returned by customers, and you described for us the changes in that policy, in 1921 and '22, and you told us about the change in the Classification Rules which permitted your company's customers to return the bags to you collect.

Now, will you tell us whether that change in the Classification Rules of the Carriers, occurred prior to or subsequent to the time that the Dewey Portland Cement Company joined the Cement Institute?

A. Prior to the time it joined The Cement Institute.

Q. And you said that pursuant to the change in the Classification Rules, I think you said that your company allowed its customers to ship bags back collect?

46867 A. Yes, sir.

Q. Freight collect?

A. Yes, sir.

Q. And was that immediately upon the change in the Classification Rules?

A. Yes, sir.

Q. And since that time has there been any change at all in the practice of the Dewey Company with respect to the treatment of sacks returns?

A. No, sir.

46869 Q. Now, Mr. Moore, has the Dewey Portland Cement Company ever taken any steps to hinder, or discourage, or eliminate special specifications of cement, to your knowledge?

The Witness: No.

By Mr. Seeley:

Q. Well, what is the attitude, what has been the policy of the company since you have been with the company, Mr. Moore, with respect to special specifications of cement?

46870 The Witness: It has been the policy of the company to manufacture cement according to special specifications as requested by its customers.

By Mr. Seeley:

Q. Has the company had any policy of discouraging such requests?

A. No, sir.

Q. Does the Dewey Company;—as of July 1, 1937, does the Dewey Company manufacture high early strength cement?

A. Yes, sir.

Q. How long has that been the case?

A. About ten years.

Q. And has it manufactured other special cements?

A. Yes, sir.

Q. Were those special cements made to special specifications requested by its customers?

A. Yes, sir.

Q. What has been the company's experience with respect to special specifications as they effect the cost of manufacture?

A. They generally cost more to manufacture than regular Portland cement because of the interruption of operating schedules, and the typing up of storage facilities, addition of other materials into the mix that are not required in standard cement.

46871 Q. Now, you mentioned storage, Mr. Moore, has the company, the Dewey Company, increased or decreased, or made any changes in its storage facilities with respect to special cement?

46874 Q. Now, Mr. Moore, Mr. Wooden has used the word "quality". I want to ask you what the Dewey

Portland Cement Company has found with respect to the quality of its cement and the quality of competitors' cements, and whether you manufacture your cement to meet any specifications or any standards; tell us what your experience has been.

A. We manufacture our cements to meet the specifications described by the American Society for Testing Materials, and specifications of the United States Government—

Q. The what?

A. Specifications of the United States Government for various types of work, and also the specifications for high early strength cement. We endeavor to have our cement at least as good as that of any of our competitors. We maintain an extensive testing and research laboratory, where we are continually analyzing and testing the cements of our competitors to ascertain the standards to which we must keep our products.

46875 Q. And what has been your experience, do you make tests of competitors' cements?

A. Yes, sir.

Q. As well as your own?

A. Yes, sir.

Q. And what have you found with respect to those tests?

A. Well, we have found practically universally, I do not know of any exceptions, that their cements have also met the standards that I described, and in many instances, they have been considerably above the standards, and when we discover that sort of a situation, why, of course, we took immediate steps to change our method of manufacturing to at least equal the standard of the cement that we had discovered to be better than ours at a particular time.

Q. You immediately manufacture your cement to meet the higher quality of your competitor's cement?

A. Yes, sir; that is what you have to do in order to be competitive.

Q. You mentioned the specifications of the Government. Do you refer to the National Bureau of Standards?

A. Yes, sir. That is one of them, and also there is a special specification for particular types of work.

Q. Now, are these laboratories of your company certified by the Government?

A. Yes, sir. By the Bureau of Standards. They
46876 inspect them periodically, and as to equipment and procedure.

Q. Now, as to these, as to this matter of quality that Mr. Wooden talked about, has the Dewey Company ever taken any measures, or ever made any efforts to discourage or to deter competitors from advertising the quality of their product?

The Witness: It has not, within my knowledge.

By Mr. Seeley:

Q. Well, will you tell us whether, to your knowledge, the Portland Cement Association, or the American Society of Testing Materials, or any of the competitors of the company, of the Dewey Company, have ever done anything to influence the company with respect to specifications or to the quality of its cement?

46877 The Witness: The only thing that has been done, has been done by our competitors in improving the quality of their products to which we were compelled to improve ours to be competitive. There has been no other influence of any kind.

By Mr. Seeley:

Q. Then, your answer would be, with respect to the Portland Cement Association and the American Society of Testing Materials or competitors having influenced your company, your answer is "no" except with respect to having to meet their competition?

A. That is true. The answer is "no" as to the other.

46879 Q. Now, answer the same question, if you will, with respect to the statistics to which you referred this morning, has there been any change in the method of the Dewey Portland Cement Company of reporting statistics since 1916, to which you referred this morning?

Mr. MacIntyre: Reporting them to whom?

By Mr. Seeley:

Q. To the Bureau of Mines?

A. No, there has been no change, only such change as may have been made in the requests from the Bureau for information. I do not know of any. There may have been some refinements.

46881 Q. Well, when you came with the Dewey Portland Cement Company, what did you find as to the existence or non-existence of cement specifications?

A. Well, as I recall it, there were no standard specifications in the industry at that time in 1912, other than those that had grown out of common usage. As I remember it, the first specifications of the A. S. T. M. were around about 1913. I may be wrong about that, but that is
46881 the way I remember it.

Q. That is your recollection. Well, in any event, did the Dewey Company meet the specifications which its customers requested?

The Witness: Yes, wherever we had a request for special cement, we always had to manufacture cement in accordance with the specifications or forego the business; somebody else would if we did not.

By Mr. Seeley:

Q. Now, I want to know whether you or any of the officials of the Dewey Cement Company, to your knowledge, have ever been able to—well, I will ask you, has the Dewey Portland Cement Company, to your knowledge, ever been able to obtain any premium in price for its cement
46883 over any other brand of cement that were offered for sale in your markets?

The Witness: It has not.

By Mr. Seeley:

Q. Now, has it ever come to your attention, or do you know of any instance where any of the competitors of the Dewey Company have received a premium in price for their product over the Dewey product?

A. No, sir.

Q. Do your last two answers obtain regardless of these differences which you mentioned a while ago, any temporary differences in quality?

A. Yes, sir.

Q. Now, have you, a while ago, when we were talking about the specifications, the special specifications, and you mentioned storage, and we were interrupted by Mr. Wooden, prior to his Honor's ruling, I neglected to ask you what your company had done about the storage.

46885 The Witness: At our Dewey plant, we have increased our storage capacity from eighty thousand barrels, originally, to five hundred and fifty thousand bar-

rels. At our Davenport plant, we have increased our storage capacity from two hundred thousand barrels, originally, to six hundred fifty thousand barrels.

By Mr. Seeley:

Q. And have those increases in storage been required by—have you found that increasing storage capacity was required by special cement and special bins?

A. Yes, sir. Many of the bins are tied up with small quantities of cement in them, and that, at times, three bins will be tied up with a total quantity that could be handled in the one bin of standard cement under special specifications.

46886 Q. Now, I have one final question.

Has the Dewey Portland Cement Company ever been able, to your knowledge, to get any more money for Portland cement made to conform with special specifications than it has been able to get for its standard cement?

A. No, sir. It has not. Generally, it got less for the special cements.

Q. And I understood you to be speaking of the same special cements which you testified a moment ago were more costly to produce?

A. Yes, sir.

Trial Eaxminer Norwood: Tell us why.

The Witness: Most of the special cements were manufactured for Government purposes, and the sales were generally at prices lower than our going market at the time for regular Portland cement.

Mr. Wooden: Delivered.

46894 Q. Referring again, Mr. Moore, to Commission's Exhibit 418-A, did the Dewey Portland Cement Company ever at any time establish or operate any warehouse in Milwaukee?

A. They did not. You mean Milwaukee, Wisconsin, do you?

46897 Q. Now, Mr. Moore, you say that—you said that you did not operate or establish any warehouse in Milwaukee, that the Dewey Company—did the Dewey Company find any competitors did have warehouses in Milwaukee?

A. Yes, sir.

Q. And did the Dewey Company continue after finding that out, did the Dewey Company continue to sell to its customers by rail?

A. Yes, sir.

Q. And were those customers—what did you find as to whether those customers were satisfied to take delivery from you by rail?

A. Well, we found that they were not satisfied, that we had to make arrangements with the trucking company to deliver the cement from the car to the customer to
46898 meet the deliveries from the silos and warehouses in Milwaukee.

Q. Did you absorb that expense yourself?

A. Yes, sir.

Q. Now, how did the—we are speaking of the time of the Commission's Exhibit. I direct your attention to the time you mentioned when you found competitors delivering from warehouses, and you met that competition.

How did the Dewey Company's mill nets compare generally with its mill nets, generally, on those sales?

The Witness: The mill nets on the Milwaukee sales were not greatly different from our average mill realization.

By Mr. Seeley:

Q. Now, did the Dewey Portland Cement Company have any agreement or understanding at that time, or at any other time, with any competitor concerning warehouses?

A. No, sir.

Q. Has the policy of the Dewey Company, to your knowledge, with respect to operating warehouses or not operating warehouses, been influenced by its competitors?

A. No, sir.

Q. Now, Mr. Moore, has the Dewey Company had
46899 any policy as to who it considers to be a qualified dealer?

A. Yes, sir.

Q. How long has it had such a policy?

A. Well, at least since I have been with the company, for twenty-eight years.

Q. Well, since that time, during those twenty-eight years, has that policy, to your knowledge, changed since that time?

A. No, sir.

Q. Do you recall any so-called definition of a dealer in the Code of Fair Competition for the cement Industry during the N. R. A.?

A. I recall that there was something in the Code to that effect.

Q. Well, how did the Dewey Company consider that definition of a dealer with respect to, or how did you find that definition of a dealer, compared with the policy of the company theretofore?

A. No material difference between that definition and the definition that we had always followed.

Q. Well, during the Code, or subsequent to the N. R. A. Code, was there any change in the policy of the Dewey Company in regard to selection of its dealers?

A. No, sir.

Q. Now, tell us, Mr. Moore, whether in case there is any question in your company as to whether a man is
46900 qualified to represent you as a dealer, are you consulted?

A. Yes, sir.

Q. In deciding whether your company will sell a man as a dealer, does your company concern itself with whether the account is sold by other cement manufacturers?

A. No, sir.

Q. Well, has the company ever concerned itself with that question?

A. No, sir.

Q. Does your company consider whether the prospective customer is a member of any dealers' association?

A. It does not.

Q. Has it ever done so?

A. No, sir.

Q. Does your company, or has your company ever attempted to determine whether its dealers or any of them are members of dealers' associations?

A. No, sir.

Q. Has The Cement Institute, to your knowledge, ever had anything to do with the policy of your company, or has it ever influenced the policy of your company with regard to whom you sell as dealers?

A. No, sir.

46901 Q. Are the salesmen of the Dewey Company informed concerning the policy of the company with regard to selection of dealers?

A. Yes, sir.

Q. Briefly tell us what your salesmen do in the matter.

A. Well, when it comes to selecting a customer that we haven't sold before, the salesman, in the first instance, is instructed to report on the facilities that the proposed buyer has.

46902 Q. Mr. Moore, has the Dewey Company, to your knowledge, ever had any understanding with any of the respondents in this proceeding, or with any cement manufacturer, or with any dealer, or group of dealers to limit its sales to dealers who fall within any definition of a dealer?

A. No, sir.

46920 Q. Mr. Moore, will you state; that is, during the N. R. A. Code period, did the Dewey Portland Cement Company file any prices with the Code authority?

A. Yes, sir.

Q. As far as you know was there a—I will ask you first, was the procedure and the method of the matter of price filing by the Dewey Portland Cement Company under your Supervision?

46921 A. Yes, sir.

Q. As far as you know, was there any restriction or restrictions ever placed upon any of the prices that the Dewey Company filed, by the Code Authority?

A. Never.

Q. What was the attitude of your company with respect to filing prices with the Code Authority?

A. How?

Q. Did you or did you not feel free to file at any time any price or terms, or conditions of sale that you chose to?

A. Oh, yes. We felt entirely free to file any prices or conditions of sale that we wanted to.

Q. Well, in the first instance, in making your first filing with the Code Authority, tell us briefly, and yet completely, what you did, in your company?

A. We filed copies of our current price schedules that had been prepared for use of our salesmen and in our sales offices. That was our initial filing.

Q. In making those filings, Mr. Moore, I want to get the source of the prices that you filed.

A. Well, the source of our prices was prices that we had picked up in the field, and determined were necessary to meet, or in order to meet competition; in other words, which we had determined were necessary to meet in

46922 order to compete for business at destination. You understand, they were all destination prices.

Q. Were they, or were they not your current prices?

A. Yes, sir. They were our current prices in effect at the time.

Q. Well, now, subsequently, subsequent to the filing that you made with the Code Authority in the first instance, did your company, the Dewey Portland Cement Company, receive any notices of prices filed by competitors?

A. Yes, sir, we received such notices from the Code Authority.

Q. Were any of those prices on file, of which you received notice, for points at which you had previously filed prices, yourself?

A. Some of them, yes, sir.

Q. You say some of them?

A. Yes, sir.

Q. Did you receive notice of prices filed for some points for which you had previously not filed prices?

A. I do not know, or I cannot say that we did not receive notices from the Code Authority covering all the prices we had filed.

46924 New York, New York,
Wednesday, October 23, 1940.

46925 RAYMOND W. MOORE resumed the stand and testified further as follows:

Direct Examination by Mr. Seeley (Continued).

Q. Mr. Moore, at the close of the hearing yesterday, we were discussing a matter of price filing under the N. R. A. Code, and the policy and practice of your company in complying with the terms of the price filing provisions.

I think you told us the source of the prices which you filed; is that correct?

A. Yes, sir.

Mr. Seeley: I will now ask to have marked for identification, with separate numbers, two batches of papers consisting of several sheets each.

46926 Trial Examiner Norwood: They may be so marked.

(The documents referred to were marked "Respondents' Exhibits 3621-A, 3621-B, 3621-C, 3621-D, 3621-E, 3621-F, 3621-G, and 3621-H, and 3622-A to 3622-U," inclusive, for identification.)

By Mr. Seeley:

Q. Mr. Moore, did the Dewey Company file prices, to your knowledge, in the State of Arkansas, during the Code period?

A. Yes, sir.

Q. Then, did, specifically, did the Dewey Company file in DeWitt, Stuttgart, Hamburg, Harrison, and Warren Counties?

A. Those are in our trade territory, we would be in that, I should say, and they would be in our price list. That is what I mean. Since they are in our trade territory, they would be in our price list.

Q. Without taking the time to read these various destinations, I show you—I am referring now to Commission's Exhibit No. 409-I, Respondents' Exhibit for identification, No. 3621-A to H, and ask you whether those are—what this is, if you can tell us?

A. 3621-C to H, inclusive, is our Arkansas price list, effective October 1, 1933.

3621-B—pardon me—

3621-A is a supplement No. 1 to that price list.

3621-B is supplement to the same price list.

46927 Frankly, I don't quite understand how these were —anyhow, that is what they are.

Q. Those price lists and supplements cover the period beginning with the original price lists?

A. You mean, the dates?

Q. Give us the dates.

A. Original price list effective October 1, 1933, list No. 1 seems to be effective February 2, 1934, that supplement No. 1 seems to be in effect after supplement No. 2, for some reason.

Q. Do you recognize this as a regular part of the records of the Dewey Company?

A. Yes.

Q. It is a regular piece of the records of the Dewey Company?

A. Yes.

Q. Were they used for price information by your salesmen during the period you have mentioned?

A. Yes, sir.

Q. Are they the source to which you referred yesterday, when you said you filed prices with your company; I mean, when you said you filed prices that your company was quoting during the Code period?

A. Well, these are the prices that I referred to.

Q. Did you file those current prices during the Code period for these destinations, and other destinations,
46928 in Arkansas, to which I have referred?

A. Well, I have not checked those destinations you have referred to, Mr. Seeley.

Q. Will you look at Commission's Exhibit No. 409-I, and just tell us as to the first one or two—tell us whether those papers are the sources of the prices you filed for those destinations?

A. In checking the first three they are the same as the prices shown in our price list; those prices shown on this Exhibit 409-I.

Q. The prices purporting to have been filed by the Dewey Company?

A. Yes. Do you want me to check more of them?

Q. No. I do not think that is necessary.

A. All right.

Q. Have you prepared, or are you prepared to state, now, whether those price lists which you have identified as the then current price lists of the Dewey Company, that they were or were not the sources of the prices that you filed with the Code Authority for the destinations referred to, on the Commission's Exhibit—

A. (Interposing) I do not quite understand what you mean by "sources", Mr. Seeley. The source for our prices were the prices that we discovered at the destinations named, and adopted as our prices. Of course, those
46929 price lists represent a compilation of them.

Q. A record of them?

A. Of those prices.

Q. Of current prices you found were the going prices at those destinations?

A. Yes.

Q. Are those the same prices which you filed with the Code Authority?

A. Yes, sir. That is right.

Q. Now, without taking up the time to go through all of the prices which are contained in Commission's Exhibits Nos. 408, 409, 410, and the various divisions thereof, if any, which purport to be the prices filed by the Dewey Company with the Code Authority, I will simply ask you—I will simply show you this set of papers, being Respondents' Exhibits Nos. 3622-A to U, and ask you, if you can, to identify those papers.

A. Well—

Q. First, I will ask you this, Mr. Moore, whether the Dewey Company, to your knowledge, filed prices during the Code period for destinations in Kansas.

A. Yes, sir. It did.

Q. Specifically, do you recall filing prices for Iola-Garnett and Atchison—

Mr. Seeley: Strike "Iola."

46930 By Mr. Seeley:

Q. For Garnett, Atchison, Medicine Lodge, and Great Bend; do you recall any of those?

A. Those are all destinations at which we do business. I am sure that they were in our price lists.

Q. Well, now, can you identify those papers which you hold in your hand, which are Respondents' Exhibits 3622-A to H?

A. 3622-E to H is our Kansas price list, effective October 1, 1933.

Exhibit 3622-A is supplement No. 3 to our price list effective February 15, 1935.

Exhibit 3622-B is supplement No. 4 to that price list, effective March 28, 1935.

Exhibit 3622-C is supplement No. 2 to that price list, effective January 8, 1935.

Exhibit 3622-D is supplement No. 1 to that price list, effective January 24, 1934.

Q. Can you tell us whether those papers which you hold in your hand are the records of the prices which you filed with the Code Authority during the N. R. A. for the destinations in question, as contained in Commission's Exhibit No. 409-C?

A. They are.

Q. Were the prices, to your knowledge, were the prices of which these sheets are the record, the list, current
46931 —lowest current or going market prices that you had at those destinations?

Mr. Wooden: We object to it as leading.

Mr. Seeley: I will withdraw the question.

Trial Examiner Norwood: Question withdrawn.

By Mr. Seeley:

Q. You said a moment ago that these papers are a record of the prices that you filed for those destinations, at the time?

A. Yes, sir.

Q. You said that you adopted those prices and filed those prices with the Code Authority?

A. Yes, sir.

Q. What do you mean by "adopted those prices"?

A. Well, the lowest price at destination is the price that we adopt as our own price in quoting our customers, in order to meet the lowest price necessary.

Q. Those are the prices which you filed with the Code Authority?

A. Yes, sir, they are.

Q. Well, now, can you tell us whether the practice of the Dewey Company with respect to all the other destinations for which you have filed prices with the Code Authority during the N. R. A., was the same or different from what you have just described to us with respect to Commission's Exhibits No. 409-I, and 409-C?

46932 A. It is the same.

Q. And were the records from which the Dewey Company took the prices which it filed with the Code Authority similar or dissimilar from these Respondents' Exhibits?

A. They were the same.

Q. For the respective states?

A. Yes, sir.

Mr. Seeley: I offer in evidence Respondents' Exhibits for identification 3621-A to H, and 3622-A to U.

(Handing the exhibits to Mr. Wooden.)

46936 (RESP. EXS. 3621-A to H, and 3622-A to U, inclusive, were offered and received in evidence.)

By Mr. Seeley:

Q. I have just one question, Mr. Moore.

When you said, prior to the introduction of these exhibits, that the practice of your company was the same

46937 for other destinations in filing prices during the Code period, and when you said the source of these prices and the record of these prices which you had in your company, were similar for other destinations, did your answer apply to all of your sales territory for which you filed prices?

A. Yes, sir.

Q. All the states?

A. It did, yes, sir.

Q. And did your answer apply for the whole period during which you filed prices?

A. Yes, sir.

Q. Now, you told us yesterday, I think, that the price filing by the Dewey Company was under your supervision?

A. Yes, sir.

Q. Did you ever have any contact with any competitor in regard to any price filed or the filing of any price for any destination, or for any job?

A. No, sir.

46938 Q. Did any of the competitors of the Dewey Company, to your knowledge, Mr. Moore, ever consult the Dewey Company or any of the officials regarding filing of prices?

A. Not to my knowledge.

Q. Or regarding any price that was filed or to be filed?

A. No, sir.

Q. Mr. Moore, do you recall any order issued by the President of the United States regarding the prices that you could quote to the Government?

A. Yes, sir.

Q. I show you Commission's Exhibit 179. I ask you if that is the order to which you refer?

A. It is.

Q. Mr. Moore, did the Dewey Company quote prices to the Federal government fifteen per cent. below its quotations to its regular customers?

A. No, sir.

46939 Q. Why not, if you can tell?

A. We considered that the Federal government was not entitled to any better price than our regular customers.

Q. And why is that?

A. Because our company has, from its inception, tried to develop the dealer business and through the years has had a record of cooperation with the dealers, and we felt that by making a lower price to the Government would react against us in our connection with our dealers.

Q. Well, when you say in "cooperation" with the dealers, what do you mean; do you mean the dealers, as a group, or your individual dealers?

A. I do not believe I said "in cooperation," did I?

The Witness: Well, by "cooperation," I mean in the development of business for the dealers, working with the

dealers to obtain business from contractors, the installation of advertising programs, various methods of assisting the dealers to handle the business.

By Trial Examiner Norwood:

Q. Has that always been your policy, or the policy of this company?

A. Yes, sir, it has from the inception of the company.

46940 By Mr. Seeley:

Q. Did the Dewey Company give any consideration to this executive order, as to whether it would or would not comply with it?

A. Yes, sir.

Q. And did you, in so doing, did the management of the Dewey Company feel that it would give them any advantage over competitors?

A. No, sir, it did not.

Q. Well, you spoke of your attitude toward the—your dealer trade, as compared with the Federal government. I want to know whether the Federal government has been a purchaser of your company's products, and to what extent?

A. Well, it has been a purchaser of the company's products to a considerable extent, probably twenty-five or thirty per cent. at different periods; that is, I mean that through direct and indirect purchases, depending upon the W. P. A. programs, I am thinking about.

Q. You refer, do you, to cement that ultimately was used on some project or other?

A. That is right, our sales—

Q. But you do not refer to products which you sold direct to the Government?

A. No, those sales were relatively small sales.

Q. And have they ever been any other than relatively small?

A. Oh, no.

46941 Q. Will you tell us, Mr. Moore, as to the business to which you have referred, some of which you sold to dealers and which you told us was ultimately used in some Federal project, whether any change—was there any change at any time in the practice of the Dewey Company in selling that product, as to whether it sold it to dealers or to the Government?

A. No, sir. They followed the same method of selling.

Q. Which you have since you have been with the company?

A. Yes, sir.

46944 Q. Tell me, Mr. Moore, did you—during the Code period, did the Dewey Company make any change in its operations which you took into consideration in deciding whether you would or would not comply with this executive order?

46946 The Witness: Yes, sir. Well, I would say that it did have an influence. Because we had already increased our labor scales to take care of the request of the President, and followed it up in the N. R. A. Cement Code.

Our cost of fuel had been increased for the same reason. Our costs of supply, machinery, and gypsum, and of bags, all had been increased for the same reason.

46948 Q. As far as you know, Mr. Moore, did the Code Authority take any position as to whether your company, or any member of the industry, for that matter, should act on the President's executive order concerning the quoting the Government fifteen per cent less than their dealers?

46949 The Witness: No, sir. It did not.

By Mr. Seeley:

Q. So far as you know, or to your knowledge, Mr. Moore, so far as any of the officials of the Dewey Company are concerned, did the Cement Institute ever take any position on this matter of the Executive order concerning the quoting of the Government fifteen per cent below dealers?

A. No, sir.

Q. Did the Dewey Company, to your knowledge, ever have any agreement with any of its competitors with regard to the Executive order, Commission's Exhibit No. 179?

A. No, sir.

Q. After the Schechter decision, Mr. Moore, to which I referred a moment ago, in order to be able to comply with Mr. Wooden's request to fix the time of the N. R. A. period for the purpose of my questions, did the Dewey Company file any prices with the Trade Practice Committee of the Cement Institute?

A. Yes, sir.

Q. For how long, if you recall?

A. About five months.

Q. Under what circumstances, or understanding, did your company file those prices?

A. Well, it was on our understanding that there
46950 would be some legislation to replace the N. R. A., and to continue the efforts of the Administration to maintain higher wage scales and shorter hours, and we thought that the Cement Institute would be the vehicle through which such legislation would be enforced. As it was during the N. R. A. period, therefore, we, as we had already increased our wage rates, we felt that we should take advantage of any opportunity that might present itself to cooperate with the Government in an effort to maintain the wages.

Q. Did the Dewey Company, to your knowledge, feel any obligation—well, I will ask you, since you were in charge of price filing; did you feel any obligation to file prices after the Schechter decision?

A. No, sir.

Q. Did your Trade Practice Committee make any—or do anything that you considered an effort to control what prices should be filed in the time that you were filing prices with them?

A. It did not.

Q. Does your answer pertain, as well as to that, to the terms and conditions of sale, or is it different from that?

A. It is the same.

Q. Do you recall, Mr. Moore, whether the Dewey Company answered any questionnaire of Professors Clarke and Burns?

A. Yes, sir.

46951 Q. In 1935?

A. Yes, sir.

Q. I now refer to Commission's Exhibit Nos. 971-13-B; 972-Q to 3-T; 976, 3-G to 3-T; 976-11-C to 12-K.

A. Yes.

Q. Tell us, Mr. Moore, if you can—first, did your company answer that questionnaire?

A. Yes, sir.

Q. And in so doing, what was the understanding of the company?

46952 Q. Has—with whom did you consult, Mr. Moore, if anybody, at the time that the Dewey Company answered that questionnaire?

A. I—

Q. (Interposing.) I will withdraw that. Were you consulted, Mr. Moore, at the time that the Dewey Company answered that questionnaire?

A. Yes, sir.

Q. Are you familiar with the answers of the Dewey Company?

A. Yes. They were answered by—in a conference had between Mr. Tyler, president of the company, myself, and our general auditor.

Q. Now, the three of you got together on it?

A. Yes.

Mr. Seeley: Now, may I have my question, my previous question read and the answer by the witness?

Trial Examiner Norwood: Read the two previous questions, as I think they are connected.

(The questions and answer referred to were read by the reporter, as follows:

"Q. Tell us, Mr. Moore, if you can—first, did your company answer that questionnaire?

46952 "A. Yes, sir.

"Q. And in so doing, what was the understanding of the company?")

The Witness: We understood that the questionnaire was to be taken into consideration; that is, our answers were to be taken into consideration by Messrs. Clarke and Burns, along with answers to questionnaires that were to be submitted by other companies, and a fair and unbiased summation be made therefrom by the Professors of practices prevalent at that time in the cement industry.

We understood that there had been reports relating to the industry and its practices that had been broadcast by uninformed persons that were detrimental to the industry.

This was a move to try and counteract those influences.

By Mr. Seeley:

Q. Did anybody—did any one in the Dewey Company, to your knowledge, have any part in the preparation of that questionnaire that you answered; I am speaking now of the questions.

A. No.

Q. Did any one of your representatives have any contact with the Professors Clarke and Burns, to your knowledge?

46953 A. Only through correspondence in submitting our answers.

46954 Q. Can you tell us by referring to these sheets,
46955 Commission's Exhibits Nos. 973-1-J, whether the sheets 973-1-J, and this sheet, (indicating) is the answer of the Dewey Company to the Burns and Clarke questionnaire, or—is Commission's Exhibit 972-2-Y, the answer of the company?

A. Well, I cannot say, Mr. Seeley—first, the form does not look to me like the form that we had before us at the time, from Clarke and Burns.

46956 The Witness: Well, if this is a reduction of the original—photographic reduction of the original report, I would say that 972-2-Y—is that the right number—927-2-Y—that is it.

By Mr. Seeley:

Q. Yes?

A. Or the report? 972-2-Y?

Q. Which you submitted?

A. Yes.

Q. And the other is what? It is not it?

A. No, this is—that one; (indicating a sheet of paper) the other one is not. (Indicating another sheet of paper.)

Trial Examiner Norwood: Clear up the record as to what the witness is referring to. I do not think that will be at all clear.

46957 By Mr. Seeley:

Q. "The other" is 973-1-J—1-I to 1-J?

A. That is right. (The witness indicates certain sheets.)

46958 Q. Mr. Moore, resuming where we left off, can you, at this time, tell us which of those exhibits and your answers to the Clarke and Burns questionnaire do represent the answers of the Dewey Company?

A. I do not think any of them do, Mr. Seeley. I do not recognize any of them.

Trial Examiner Norwood: Do you mean that you do not think that those are genuine?

The Witness: Well, sir, as I have the questionnaire in my mind, and I can see if the way it was in the form we received it, it does not bear any resemblance to the
46959 original that we answered, that questionnaire, it has been some time since I saw that.

Trial Examiner Norwood: You mean you do not believe it is a facsimile of what your company sent in?

The Witness: Well, I can't say whether it is or it is not.

46962 Q. I want to know whether you are acquainted with Mr. Bernard L. Glover?

A. Yes, sir.

Q. Have you collaborated with Mr. Glover in any rate cases?

A. Yes, sir, in a great many.

Q. Well, covering what period, how far do you go back?

A. From 1915 to, oh, I would say, around 1935, about twenty years.

Q. Did you, in any of those cases, represent the Iola Cement Mills Traffic Association?

A. Yes, sir.

Q. Did you participate in any proceeding brought before the Interstate Commerce Commission in 1923, relating to the rate structure in Oklahoma?

A. Yes, sir, I did.

Q. Who did you represent in that proceeding?

A. Dewey Portland Cement Company and the Iola Cement Mills Traffic Association, jointly with Mr. Glover.

Q. Will you just tell us briefly what your participation in that case consisted of; that is, what was the pro-

46963 ceeding about, and what did you do?

A. The proceeding involved rates on cement from various producing points in Kansas, Oklahoma, and Missouri, to destinations in the State of Oklahoma, also intrastate rates on cement in Oklahoma.

The case originated through a complaint filed by the Iola Cement Mills Traffic Association, of which our company was a member, following a decision of the Interstate Commerce Commission in 48 I. C. C. 201, being the so-called Western Cement rates case, in which case the Interstate Commerce Commission had prescribed interstate rates on cement for application in so-called western trunk line territory, which included Kansas.

The rate—

Q. Now, excuse me for interrupting you. Is that Western Cement rates case to which you referred in 48 I. C. C., the so-called Docket No. 8182?

A. Yes, the same.

Q. And when was that decided, do you know?

A. It was decided in 1917, as I recollect. The rates under it were effective August 8, 1918.

Q. Excuse me. If you will go on.

A. Well, the basis of rates prescribed in Docket 8182 for interstate application in Kansas were so much higher than the rates for interstate and intrastate applica-
46964 tion on cement in Oklahoma, we thought there was no justification for the higher rates in Oklahoma, so we filed this complaint which brought in issue the Oklahoma rates.

That case, as I recall it, was I. C. C. Docket 14936, reported in 87 I. C. C., I believe.

Q. That is the case about which I inquired, the case, the proceeding in which you participated in 1923 concerning rates, the rate structure in Oklahoma, to Oklahoma destinations?

A. Yes, sir.

Q. Now, you said yesterday that—well, first, I will ask you, were you familiar with the freight rates at the time that the Dewey Oklahoma mill of your company was built, from that mill, and from gas belt plants?

A. Yes, sir. When I went with the company in 1912, they had in their files the Tariffs of the railroads naming rates back to 1900, and in my work in the traffic department, that time I made use of those tariffs in preparing evidence for submission to the Interstate Commerce Commission in these various cases.

Q. Well, how, if you know, did those rates which, the rates to those destinations from the Dewey mill, when it was built, compare with the rates from the gas belt plants then shipping into those markets?

46965 Q. Now, you told us about the rates at the time you came with the company, the rates from the Dewey mill to those destinations as compared with the rates from the gas belt plant, and did the company consider those rates fair or not fair as compared with the rates from the other plants?

46966 The Witness: You mean as compared with rates from the other gas belt plants?

By Mr. Seeley:

Q. Yes, at that time.

A. At that time, they considered the rates were fairly related to the rates in the other gas belt plants.

Q. Well, how, with respect to the mills east of the Missouri River, and rates from those mills to the destinations to which the Dewey Company was shipping cement?

A. Well, the company considered the rates from the gas belt, including Dewey, were not fairly related to the rates from other producing points in Western Trunk Line territory, and Illinois Freight Association territory, and the points in the southwestern territory.

Q. Did this case to which you referred, in which you represented the Dewey Company and the Iola Cement Mills Traffic Association, relate, or was it—did it have anything to do with the so-called eighty mile zone, the 87 I. C. C., I mean.

A. No, sir. It did not, only to this extent: in that case the Interstate Commerce Commission said that the rates from the mills in the gas belt to destinations in Oklahoma interstate for distances of seventy miles and less,
46967 should be on the mileage scale, the Commission used in prescribing rates in that decision, and beyond the seventy mile zone from any mill, the rates to destinations in Oklahoma were fixed at the same figure from all mills in the gas belt group. That was merely an extension into Oklahoma of the grouping of the gas belt mills, and the application of the seventy mile scale of rates therefrom that the Commission had previously prescribed in Docket 8182 for the territory north of Oklahoma.

Q. Now, as to the decision in this case, 87 I. C. C. case, to which you referred, did it have any effect on the cost of transportation to the points and territory embraced in that decision?

A. Oh, yes, it reduced the rates very materially to destinations in Oklahoma.

Q. Well, can you tell us, so far as the Dewey Company is concerned, whether those reductions in rates were reflected or passed on in prices that the Dewey Company charged to customers?

A. Yes, sir, it immediately affected the prices for cement in Oklahoma.

Q. How did it affect it?

A. By causing immense reductions in those prices.

Q. To Oklahoma destinations, generally?

A. Yes, sir.

46968 Trial Examiner Norwood: Were the price reductions equivalent to the amount of the change in the freight?

The Witness: Yes, sir.

By Mr. Seeley:

Q. Now, what change, if any, did the decision in 87 I. C. C. effect, or have upon the decision, the other decision to which you referred in 48 I. C. C., the Western Cement Rates case, I want to know whether it effected any change?

A. No, it did not effect any change in the decision, in the 8182 case.

Q. Did the Interstate Commerce Commission in the 87 I. C. C. case uphold the rates, or did it not uphold the rates in 48 I. C. C. case?

A. Well, it extended the same rates in the 48 I. C. C. case; that is, Docket 8182, into Oklahoma, and further said that the grouping of the Kansas gas belt mills which had been put in issue by other interests, should be maintained.

Q You say "put in issue by other interests." What do you mean by that?

A. Well, some of the mills outside of the gas belt complained to the Interstate Commerce Commission that the gas belt mills should not be grouped at a single rate for distances beyond seventy miles from the nearest mill in that group, and there had been two complaints filed, one by the Missouri Portland Cement Company, and one by the Lehigh Portland Cement Company, attacking
46969 that grouping, and as I recall this 87 I. C. C. decision, the Commission said there that the grouping was in issue in these other proceedings and pending a decision, in those cases, the grouping should remain as it was.

Q. Did you, Mr. Moore, participate in any case in 1928 or 1929 before the Interstate Commerce Commission relating to the so-called eighty-mile zone; the rates in the eighty mile zone?

46970 The Witness: Yes. That was, as I recall it, it was Docket No. 20303, which was consolidated with the two formal complaint cases that I referred to, in which the grouping of the gas belt mills had been attacked by the interests I named.

Q. Now, with respect to this eighty-mile case, Mr. Moore, what was the result?

46971 A. The result was that hearings were held at a number of places in the country, including our market territory, as well as other territories. It being a case instituted by the Interstate Commerce Commission on its own motions, to investigate the rates on cement in effect

within the so-called eighty-mile zones from the various mills.

Q. Did the Interstate Commerce Commission make any inquiry concerning trucking in those cases?

A. Oh, yes. That was the primary purpose of the Docket No. 20,303 case, it was to develop the facts as to whether or not the rates on cement for distances within eighty miles were too high, and whether they should be reduced in order to meet the trucking competition, if there had been or was any trucking competition.

In our complaint, to which I referred, the complaints, the gas belt group—

Q. Yes.

A. In these complaints to which I referred attacking the gas belt group, allegations had been made by some of our competitors—some of our competitors that had brought those cases—that rates were too high, and if they were not reduced, traffic would be lost by the railroad to the trucks for those distances.

Q. What finding, if any, did the Interstate Commerce Commission make in that case?

46973 A. Yes. I can give it to you. I cannot give it to you from memory right now, but as I recall it, it is 157 I. C. C. the Interstate Commerce Commission dismissed the proceedings.

Q. Now, Mr. Moore, do you recall any case, the so-called "15 per cent. case," in 1931 before the Interstate Commerce Commission?

A. Yes, sir.

Q. Did that case have anything to do with the so-called eighty-mile zone?

A. No, sir.

Q. Is that the same case described as "Ex Parte 103"?

A. Yes, sir.

46974 Q. What was that case about? What was the occasion or the purpose of that proceeding?

A. That was a Revenue case, a request and application by the railroads of the country for a fifty per cent. increase in all of their freight rates and charges, or some percentage.

Q. Was the Dewey Company represented in that case?

Mr. Wooden: Your Honor, I object to this whole line involving the 15—I presume that is what he meant, he said 50.

The Witness: It should be fifteen per cent. increase.

46975 Q. Now, in this so-called "15 per cent. case," Mr. Moore, I would ask you then as to whether the 46976 Dewey Company was represented, and if so, in what capacity, or in what respect?

A. Well, it was represented through its membership in the Iola Cement Mills Traffic Association.

Q. What action, on what—what kind of a member was the—as what kind of a party was the Dewey Company represented, was it a respondent, a defendant, or a complainant, or intervener, or whatever it was?

A. Well, I do not know how they designated the parties in the proceeding. It was just as its own interest appeared.

Q. Was the Dewey Company to be a necessary party in that proceeding?

A. Not unless it elected to be a party to it.

Q. Did the Dewey Company submit any data concerning the cost or expense of trucking to the Iola Cement Mills Traffic Association for use in this case?

A. No, sir.

Q. Ex Parte 103?

A. No, sir, it did not.

Q. Did the Dewey Company have any information or data upon, or concerning the cost of transportation by cement—transportation of cement by truck?

A. No, sir.

Q. It did not?

A. No, sir. It did not.

Q. Well, did any of the other companies repre- 46977 sented in the Iola Cement Mills Traffic Association, to your knowledge, submit any data, any factual data, or any information concerning the trucking of cement by truck—cost of carting cement by truck?

46981 The Witness: Yes, sir. In all these cases in which the Iola Cement Mills Traffic Association represented our company, I participated in the preparation of cases for submission to the Interstate Commerce Commission, and I was entirely familiar with all of the data that we accumulated and submitted, as well as participated in the writing of briefs, and the argument of the case.

By Mr. Seeley:

Q. Now, can you tell us, in view of your response to his Honor's inquiry, Mr. Moore, can you tell us for what purpose or reason this map was introduced in this case?

Trial Examiner Norwood: Point out the map.

By Mr. Seeley:

Q. I refer to Commission's Exhibit No. 2188, and the case I refer to is Ex Parte 103, otherwise known as the "15 per cent. case"?

46982 A. Of 1931.

Q. Of 1931?

A. Yes, sir. The whole purpose of introducing this map in that case was to try to convince the Interstate Commerce Commission, the Commission, and the railroads, that they should not increase rates on cement for short hauls, that to do so would cause the carriers to sustain a loss in their revenues, on the presumption that the traffic would move by truck if the rates were increased in any amount over the then going rate.

Q. You say you "presume" or "on the presumption," Mr. Moore.

A. Yes.

Q. Was any factual data or any—was there any factual basis or bases submitted to the Interstate Commerce Commission in support of that map?

A. No, sir. I am positive there was none.

Q. Did you, or to your knowledge, any of the other companies represented in the Iola Cement Mills Traffic Association, obtain any information or any factual data as to the cost of trucking cement and present it to the Interstate Commerce Commission?

A. No, sir.

Q. Now, with reference to those cases, Mr. Moore, in which you represented the Iola Cement Mills Traf-

46983 fic Association, and at other times—and in which the Dewey Company was represented, at times, has there ever been any agreement, to your knowledge, between any of these competing cement mills to take any steps or measures to secure uniform rates in connection with price quotations?

A. (There was no answer.)

Q. My question is: is, or has there ever been any agreement between any of these cement mills to obtain uniform rates or to take any measures to obtain them?

A. I would like to know what you have in mind when you are talking about "uniform rates."

Q. I am speaking of rates from various mills to the same destinations which would be uniform.

A. I see.

Q. I am referring to the eighty-mile — the so-called eighty-mile zone — uniform rates among themselves.

A. Well, the Iola Cement Mills Traffic Association and its members contended that for a distance of beyond eighty miles from the nearest mill, the rates from all mills should be the same. That was, even before 8182. That was the position of the mills.

But, as having contended that rates outside of the gas belt should be the same as the rates from mills in the gas belt, we never made any such contention.

The bases that were finally fixed were, in many
46984 of the cases, were the bases proposed by the Iola Cement Mills Traffic Association.

In Docket No. 8182, the Interstate Commerce Commission comments upon the proposals of the gas belt mills as well as the proposals of other mills, and incorporated in its report a statement that it adopted some of the principles advocated by the gas belt mills, and others it rejected.

Q. As to these rates beyond the eighty-mile zone, which it was the contention of the Iola Cement Mills Traffic Association should be the same—was there any agreement amongst these members of the Association to quote prices —uniform prices based upon those rates?

The Witness: No. There was no understanding of that kind.

By Mr. Seeley:

Q. Mr. Moore, was there ever—I just want to know from you what the purpose was—whether it was the purpose or not the purpose for—of any of these members, to your knowledge, of the Iola Cement Mills Traffic Association to obtain those rates in order to make those prices uniform?

46985 The Witness: No, sir.

By Mr. Seeley:

Q. What was their purpose?

A. To get a fair adjustment of the freight rates from the gas belt mills, as compared with the rates enjoyed by competitors of those mills.

Q. Mr. Moore, coming to a new topic.

A. Yes.

Q. What has been the method of the Dewey Company in quoting to railroads?

A. Quoting what?

Q. Quoting prices to railroads on cement.

A. Why, of the railroads reaching our mills with their own rails, we quote f.o.b. cars at our plant.

To railroads that do not serve our plants directly, we quote prices f.o.b. the nearest junction point, rail junction point, with the connecting line.

In other case, we quote the dealer's price at destination.

Q. Well, what determines whether you will quote
46986 in one of those ways you have described different from another way?

A. Well, it is our guess as to where we can make the most money, or where we can get the most money; it is that which determines which way we are going to quote.

Q. Do you attempt to quote prices which are competitive with other mills?

A. Yes.

Q. In quoting the railroads?

A. Yes. You surely have to do that if you are going to get any railroad business.

Q. How do you go about that?

A. In what way?

Q. Well, how do you determine if you do participate? How do you anticipate what your competitors are going to do?

A. Well, we, through our representatives in the field, as we do on our commercial business, we check up the quotations from the various mills at such destinations to determine, from such information, what prices are
46987 being quoted by the mills on the railroads serving those mills.

And if we are to meet the competition, we must quote so as to meet the price, either f.o.b. mill, or at the nearest junction point on the connecting line, as good a price as any of our competitors are currently quoting f.o.b. their mills, or f.o.b. their own junction point.

Q. In meeting competition of those mills, which you say you do, have you found, or have there been instances prior to July 1, 1937, where you have found more than

one mill—more than one competing mill, situated on the connecting line of the railroad you are quoting?

A. Oh, yes.

Q. Does that happen frequently or infrequently?

A. Frequently, very frequently.

Q. Do you, in making those quotations, take into account the prices you anticipate or anticipated would be quoted by those mills?

A. Yes.

Q. Do you attempt to meet those prices?

A. Yes, sir.

Q. Have you ascertained, Mr. Moore, what the amount of business which the Dewey Company has done
46988 where meeting such prices on cement that the Dewey Company has sold the railroads?

A. Yes, sir. That is my—one of my particular duties is to handle sales to railroads.

Q. What would you say the percentage of your railroad business was to your total annual business?

A. They average around one and one half per cent. of our annual business.

Q. Mr. Moore, has the Dewey Portland Cement Company made any quotations f.o.b. mill to the Federal government or to any of its departments?

A. Yes, sir.

Q. Has the Dewey Company ever had any understanding or agreement to quote prices f.o.b. destination to the Federal Government?

A. No, sir.

Q. Or has it ever had any agreement or understanding to quote prices to the Federal Government in accordance with any particular pricing method?

A. No, sir.

Q. Has the Dewey Company ever, at any time, agreed with any competitor, to your knowledge, to quote the same price as that competitor for cement at any place, or to submit the same bid on any public contract?

A. No, sir.

46989 Q. What have you found, Mr. Moore, on Government sales as to where you meet your competition?

A. Well, the inquiry from the Government gen-
46990 erally requests prices f.o.b. destination, and in some cases, they request prices f.o.b. destination f.o.b.

mill, so we have to figure both ways, or whichever way the specification reads.

Q. Well, in making quotations, do you attempt to meet—what prices do you attempt to meet?

A. We attempt to meet the prices at destination or the cost at destination.

Q. Why is that?

A. Because that is where the cement is used.

46991 Q. Mr. Moore, we were discussing, at the close of the morning session, the policy of your company with respect to bidding to Federal Government.

Did the Dewey Portland Cement Company, to your knowledge, receive any invitation to bid on requirements for the W. P. A. in 1935 at Rolling Forks, Mississippi?

A. I do not recall that we did, Mr. Seeley.

Q. Well, I show you Commission's Exhibit in evidence, 1063-A, and ask you if that refreshes your memory as to whether the Dewey Company received any

46992 invitation for the requirements set forth? I should say that that does not set forth the requirements. That appears to be a mailing list.

A. Yes. That is what it appears to be. Our name appears on that list as one of the firms to whom the invitation was sent.

Q. But you do not recall that invitation?

A. No, I do not recall.

Q. Tell us, if you can, at the date of, or during the period of, or at the time, at this time of the invitation which you have there, October, 1935, what was the policy of the Dewey Portland Cement Company, with respect to work of the character of the W. P. A. work?

A. Well, its policy was to not quote direct on W. P. A. work; that is, work that was handled through our dealers.

Q. How long has that been the policy of the company on work of that character?

A. Well, we never had any other policy, that I know of.

Q. And you did not change that policy?

A. No, sir; Rolling Forks, Mississippi, was not in our usual trade market area.

Q. Is not?

A. No, sir.

Q. Well, do you recall, Mr. Moore, whether the Dewey Portland Cement Company received any invitation in

April, 1938, for, covering purported requirements
46993 of the Procurement Division of the Federal Government?

A. Yes, sir. We did receive an invitation to bid.

Q. I show you Commission's Exhibits Nos. 1339, and 1340, and ask you if these papers are the—I show you Commission's Exhibit 1339, and ask you if that is the invitation which you have in mind as having been received by your company in April, 1938?

A. Yes. That is the same invitation I had in mind.

Q. Were you consulted, Mr. Moore, in the matter of that invitation?

A. Yes, sir.

Q. Did you confer with the other executives of the company as to whether the company would bid on that invitation?

A. Yes, sir.

Q. Did the Dewey Company submit any bid?

A. No, sir.

Q. What was the reason?

46994 The Witness: Well, my reasons would be those that developed during the conference when the invitation was being considered, and the reasons why we did not bid were that the time for delivery was indefinite, the rate of shipment was indefinite, the places of delivery were indefinite, and there was, as far as we could see, there was nothing very definite to bid upon, too much uncertainty involved.

46995 Q. What was the policy, Mr. Moore, of the Dewey Company in April, 1938, with respect to bidding to the Federal government on projects?

A. It was not our policy to bid direct to the Federal government on any job where the amount involved was ten thousand dollars or more.

Q. When was that policy adopted by your company?

A. Following the enactment of the Walsh-Healy Act.

Q. Immediately following?

A. Yes, sir.

Q. How long did that continue to be the policy of your company?

A. It still is. No, pardon me. It remained the policy of the company until last year.

46999 Q. Will you tell us, Mr. Moore, whether you have completed your answer with respect to the

reasons why the Dewey Company did not bid on Commission's Exhibit No. 1339?

A. I might add to the other reasons given that the company did not feel that it wanted to bid on that and to bind itself to any volume of cement such as that called for by the invitation with delivery such that delivery might be taken at points beyond its normal trade territory, for the effect that it might have on its ability to furnish its customers of long standing within its normal trade territory.

Furthermore, the company did not see how it could figure out the price that would be satisfactory to it, a price that would be satisfactory to it.

Q. Now, between the time that you mention—between the time that your company adopted this policy of declining—the policy of not bidding on any Government invitations involving more than ten thousand dollars'
47000 worth of materials, did you tell us why you adopted upon the—at the time the Walsh-Healy Act became effective, and the date—the date that you referred to last year when your company—when your policy of your company was discontinued, did your company bid on any further invitations for more than ten thousand dollars' worth of cement, or less?

A. Not to my knowledge.

Q. Did it receive any invitations to bid other than this "Good Friday" bid that I have just referred to?

A. I do not recall any.

Q. Did the Dewey Company, or any of its officers, to your knowledge, consult any other members of the cement industry at any time concerning this "Good Friday" invitation?

A. Not to my knowledge.

47001 Q. Did you or any officials of the Dewey Company, to your knowledge, have any conferences or contracts with competitors with regard to any of these Government invitations?

A. No, sir.

Q. Did the Dewey Company—or do you recall, Mr. Moore, whether your company received any invitations from the Federal government to bid on purported cement requirements of the Procurement Division in Idaho in the year 1938?

A. No, sir. I do not recall any such invitation.

Q. I now refer you to Commission's Exhibits No. 1387-89.

A. No, sir, I do not recall any such invitation.

Q. Did your company make any bids on any requirements of the Procurement Division involving cement to be delivered in this area?

A. No, sir. That was too far away from our normal market territory that the freight rate, it was so far away, that the freight rate would be too high, and we would not bid for delivery at destination on those distances for that reason.

Q. In—did the decision of your company as to whether or not it would bid on this "Good Friday" invitation, Commission's Exhibit No. 1339, have anything to do with the form or method of—the form of bid which the invitation requested?

47002 The Witness: Well, the whole thing was so indefinite, that we just decided we would not do anything about it.

By Mr. Seeley:

Q. Did the Dewey Company bid on any requirements of the Federal government at Toledo, Iowa, in June, 1932, Mr. Moore?

A. Yes, sir.

Mr. Wooden: Do you mean Toledo, Ohio, or Toledo, Iowa?

Mr. Seeley: No, no, no. Iowa. Iowa.

Mr. Wooden: All right.

By Mr. Seeley:

Q. Did the Dewey Company bid on any requirements of the Federal government for use at Toledo, Iowa, in April, 1933, Mr. Moore?

A. Yes, sir.

Q. Did the Dewey Company submit any f.o.b. mill bids in connection with those bids?

A. Yes, sir.

Q. Did the Dewey Company receive any award in either of those instances?

47003 A. No, sir.

Q. What was the policy of the Dewey Company, Mr. Moore, with respect—what was the policy of the Dewey Company prior to the Code period with respect to bidding

on invitations of the Federal government, where land grant rates were involved?

A. It was the policy to bid both the destination price and the mill price (pause), where the amount involved was less than ten thousand dollars.

Q. Does that answer hold for that period—

A. (Interposing.) You see, I was thinking about the period of the Walsh-Healy Act.

Q. Well, now, just going back to the N. R. A. Code period, I would like to have you answer that again, that question with respect to that period.

A. Well, it was the policy to bid both destina-
47004 tion price and f.o.b. mill price.

Q. Your answer that refers to ten thousand dollars applied to the period only after the Walsh-Healy Act was in effect?

A. Yes, sir.

Q. Well, I want you to go back of that period, and I ask you whether prior to the Code period, there was any change whatever at any time in the method of your company in bidding on requirements of the Federal government where land grant rates were involved?

A. No, our policy was to bid f. o. b. destination, or f. o. b. mill where the invitation called for it, either way.

Q. Where the invitation called for it either way?

A. Yes, sir.

Q. Now, I show you Respondents' Exhibits for identification, 3623-I to 3623-K, and ask you what those papers are and if you will identify those letters, please?

A. 3623-I is a carbon copy of a letter I wrote under
date of August 17, 1932, to the Commissioner of In-
47005 dian Affairs Department of the Interior, Washington, D. C.

Respondents' Exhibit No. 3623-J is an original letter from our office manager at Davenport, Iowa, Mr. W. W. Moeller, dated June 22, 1932, addressed to me.

Respondents' Exhibit No. 3623-K is a copy of a letter addressed to our Davenport, Iowa, office, signed by Mr. C. F. Clark, "Acting Purchasing Office,"—I notice that is spelled "Office"—Department of the Interior, Office of Indian Affairs, Washington, D. C., dated June 15, 1932.

Q. Throughout the period, Mr. Moore—throughout the period to which I referred a moment ago in connection with the requirements of the Federal government on which you

say you bid, at Toledo, Iowa, in June, 1932, and the time when you bid on requirements of the Federal government at Toledo, Iowa, in April, 1933, did you, did the Dewey Company continue the practice which you described a moment ago, of bidding f. o. b. shipping point, and bidding f. o. b. destination of invitations of the Federal government?

A. Yes, sir.

Q. You made no change in that practice?

A. No, sir.

Q. Wherever requested?

A. That is right.

Q. I show you for identification, Respondents'
47006-7-8 Exhibit 3623-A to 3623-F, and ask you if you can tell us what those papers are, and identify each of those letters.

A. Respondents' Exhibit No. 3623-A is a carbon copy of a letter signed by Jacob Breid, superintendent Sac and Fox Sanatorium, Toledo, Iowa, dated June 27, 1933, addressed to W. B. Fry, purchasing officer, Department of Interior, Washington, D. C., a carbon copy to Dewey Portland Cement Company, Kansas City, Missouri.

Respondents' Exhibit No. 3623-B is a copy of my letter of June 22, 1933, to Mr. Jacob Breid, Superintendent Sac & Fox Sanatorium, Toledo, Iowa—

Respondents' Exhibit No. 3623-C is a copy of the letter—

Trial Examiner Norwood: Now, can you describe those things generally here without going into those de-
tails?

47009 The Witness: Well, the only general description I could give to your Honor would be that it comprises correspondence relating to our bidding on requirements of the Government at the Sac & Fox Sanitarium, Toledo, Iowa, in 1933, April of that year.

Trial Examiner Norwood: I think that is sufficient.

By Mr. Seeley:

Q. Mr. Moore, did the Dewey Company, subsequent to this letter which you identified, Respondents' Exhibit for identification 3623-A, dated June 27, 1933, letter of Jacob Breid, did the Dewey Company, subsequent to this letter receive any further communication from Mr. Breid's Department in this matter?

A. No, sir. It did not.

Mr. Seeley: I now offer in evidence Respondents' Exhibit for identification 3623-A to F, and 3623-G to K.

Mr. Wooden: These exhibits are all objected to as incompetent, irrelevant, and immaterial. They contain arguments and self-serving declarations which are not competent, and are hearsay.

(Handing Exhibits referred to to the Trial Examiner.)

47010 Trial Examiner Norwood: Are these letters giving their reasons for not bidding f. o. b. mill?

Mr. Wooden: No.

Trial Examiner Norwood: Is that it?

Mr. Seeley: No. These letters show, your Honor, that this company did bid f. o. b. mill and did comply, in every respect, with the Government's invitation, and for its pains it got nothing.

This Exhibit is to explain why this company—I am going to show, if your Honor will permit me to proceed, the further action of the company based upon its experience in this instance.

This shows the experience which this company had in bidding f. o. b. mill, and in giving the Government the benefit of these land grant rates, and in complying with the invitations, in this instance of the Indian Department of the Interior, up here at Toledo, Iowa.

These exhibits show further that apart from the collaboration with the basing point committee of the Federal Trade Commission, the Government Purchasing Departments do not care a tinker's darn if they got these f. o. b. prices, or what those prices are. They do not even bother to figure them.

47012 Trial Examiner Norwood: I shall sustain the objection.

47013 Trial Examiner Norwood: But I think the time has come when we are to shorten up these proceedings, and when you offer anything from this moment on, it should be of unquestioned importance.

47014 By Mr. Seeley:

Q. Mr. Moore, I want to get the experience of your company with respect to this matter of bidding f. o. b. mill to the Government.

You told us a while ago that your company did bid f. o. b. mill, and with specific reference to the requirements at Toledo, Iowa.

Will you tell us—well, what was the source of the—first, tell us whether there was any land grant rate involved in

these bids that you made to the Government for delivery at Toledo, Iowa, in 1932?

A. Yes, sir, land grant rates were involved.

Q. And where did you get the land grant information which you used?

A. Figured it myself.

Q. And did you bid, does your bid, was your bid; the bid which you submitted based on that land grant rate information which you computed yourself?

47015 A. Yes, sir.

Q. You say you figured it yourself? You figured it from what?

A. From the land grant information issued by the War Department, giving the land grants in effect and applied them against the tariff rates.

Q. And did you receive the award?

A. No, sir.

Q. How did the price—do you know who did receive the award?

A. Yes, sir.

Q. Who did?

A. Medusa at Dixon, Illinois.

Q. Do you know how the price submitted by the Medusa Company compared with the price submitted by your company?

The Witness: Yes, sir. It was higher.

By Mr. Seeley:

Q. Did you take the matter up with the Government?

A. Yes, sir.

Q. With what result?

47017 The Witness: It caused us to bid, to discontinue bidding as we had been bidding, your Honor.

47018 The Witness: The rate I had figured as the land grant rate from Davenport was the correct land grant rate that should have applied, and that in making the award, the Government, itself, had computed the land grant rate from Davenport to Toledo, Iowa, at a higher figure than the correct figure.

Trial Examiner Norwood: On account of this error, then,—

The Witness: We lost the business.

Trial Examiner Norwood: —you lost the bid?

The Witness: Yes, sir.

Trial Examiner Norwood: I see. And for that reason you bid in a different way thereafter?

The Witness: Not for that reason alone, your Honor. After I took it up with them and pointed out the fact that they had used land grant rates from Davenport to Toledo
47019 that was higher than the rate they should have used, they asked us to bid a second time, which we did, and called their attention to the fact that the prior bid had gone to a competitor, because of the fact that they did not use the correct land grant rate from Davenport, but regardless of that, we lost the second order, also, and that caused us to feel that there wasn't any use trying to figure land grant rates or quote on land grant rates.

Trial Examiner Norwood: Well, how could you help it?

The Witness: We could not help it.

Trial Examiner Norwood: If you bid at all?

The Witness: Excepting that we, after that we did with a control clause in our bids which covered, or which gave the Government the right to apply the lowest commercial special or land grant rate it could figure, and therefore we did receive after that the proper consideration, as far as land grant rates went.

By Mr. Seeley:

Q. Did you or did you not try to contiue to bid, to submit bids, f. o. b. shipping point?

A. Yes, sir.

Q. After this experience?

A. Yes, sir, we still bid f. o. b. shipping point. No, let's see. We bid f. o. b.—yes, I think we still continued to bid the same way only with the control clause.

47020 Q. So that, as a result of this experience which you have described, in bidding to the Government at Toledo, Iowa, you changed your policy?

A. Yes, sir.

Q. Now, Mr. Moore, when you mentioned the control clause, when was the first occasion that the Dewey Company used the so-called "control clause"?

A. During the Code period. It was filed with the Code Authority.

Q. And in what connection was that, please?

A. It was the filing made by some of the companies with the Code Authority. We learned of it.

Q. How did you learn of it?

A. By information from the Code Authority that filing had been made.

Q. Did your company made any attempt to determine what its mill net would be on cement that it might furnish for that Fort Peck requirement?

A. Yes, sir.

Q. Was that—were your calculations based on the freight rates involved?

A. Yes, sir.

47021 Q. I show you, Mr. Moore, Respondents' Exhibits for identification 3624-A and 3624-B, and ask you what those are.

A. 3624-A is a copy of the letter I wrote to L. J. Capen, our vice president and sales manager at Davenport, Iowa, on April 6, 1934, regarding land grant rates to, or rather from Linwood to Wiota, Montana.

3624-B is an original of a letter from the General Southwestern Agent of the Chicago, Milwaukee, St. Paul, and Pacific Railroad Company, Kansas City, Missouri, addressed to me, dated April 4, 1934, quoting rates, land grant rates, on cement from Linwood and Mason City, Iowa, to Wiota, Montana.

Q. Were the rates referred to here used by you in computing or estimating that, or what your mill net would be in connection with those requirements?

A. The rates referred to here were used in computing or estimating what our mill net would be in connection with those requirements.

Q. Did the Dewey Company made any bid—first, I will ask you what the Dewey Company received; did the

47022 Dewey Company receive any award on the requirements referred to in Commission's Exhibits Nos. 164 to 166, on the Fort Peck project?

A. No.

Q. On how many of the Fort Peck lettings did you bid?

A. On the first one only.

Q. Why?

A. We were not satisfied by the net return, it was apparent we would have to be satisfied with, in the bid.

Q. You say you would not be satisfied with the net return; what do you mean?

A. That is, what we could get out of it, out of the cement, if we sold it.

Q. At the prices which you would have to bid, based upon the prices which you found were on file?

A. Yes, sir, on which we found, based upon the prices we found on file with the Code Authority.

Q. I think you said that they bid—your bid on the first letting of the Fort Peck requirements, Commission's Exhibit 164, contained a control clause?

A. I think it did.

Q. Did you ever feel obligated to use that control clause in bidding?

A. No, sir. Only to the extent that we felt if we were going to be competitive, we would have to compete
47023 as apparently others were doing, as they had filed the control clause—

Q. (Interposing.) In any bidding that your company has done in connection with Government invitations, have you ever felt obligated to follow that practice, any particular practice?

A. No, we could either do it or not, as we liked.

Q. Did you ever discuss the control clause with your competitors, at any time?

A. No, sir. No, sir.

Q. Did you or the Dewey Company ever feel it desirable to—did the Dewey Company ever file any land grant rates with The Cement Institute?

A. No, sir.

47024 (RESP. EX. 3624-A and 3624-B, was offered and received in evidence.)

By Mr. Seeley:

Q. Mr. Moore, since you have been in charge of the traffic department of your company, and prior to July 1, 1937, I am speaking of now, have there ever been any special rates in any of the territories of your company in which you have not made them available to the Government in your bidding, that you know of?

A. Not that I know of.

Q. In using this control clause, which you told us you did after discovering it in these price filing in the N. R. A. Code period, did you take into account the lowest land grant rates available from your mill?

A. Yes, sir.

Q. And from competing mills as well?

A. Yes, sir.

Q. Were there instances, or have you found instances where the lowest land grant rate was available from
47025 a mill other than yours?

A. Yes, sir.

Q. Have you found instances where that was true, whether there was no land grant available—land grant rate available from your mill?

A. Yes.

Q. Have you always given the Government, or made available those rates from other mills to the Government?

A. We have taken those rates into consideration in our bidding.

Q. Mr. Moore, is the Dewey Company's mill at Dewey, Oklahoma, situated on any land grant railroads?

A. Yes, sir.

Q. What are they?

A. The Atchesen, Topeka and Santa Fe Railway, and the Missouri, Kansas, and Texas Railroad.

Q. Is there any way that the Government can route shipments from your mill at Dewey, Oklahoma, so that
47026 the land grant rates are available over the whole journey to any destination?

A. The Dewey Company's mill?

Q. Yes.

A. No, sir. There is no way.

Q. Is your company's mill at Davenport, Iowa, situated on any land grant railroads?

A. Yes.

Q. What are they?

A. The Chicago, Rock Island, and Pacific Railroad, and the Chicago, Milwaukee, St. Paul, and Pacific Railroad Company.

Q. Have you, Mr. Moore, obtained any land grant rate information from the railroads other than what you have referred to in connection with these bids you have been discussing?

A. Yes.

Q. Did you obtain such information, or did you not, or how frequently did you obtain such information from the railroads?

A. Whenever we have need for land grant rates that we do not have in our files obtained from previous occasions that we had to use the rates, we ask the railroads to give us the land grant rates we are interested in at the particular time.

Q. Has that been the practice of your company, Mr. Moore, for some time?

A. Yes.

47027 Q. How long has it been the practice?

A. As long as I can recall.

Q. Mr. Moore, in obtaining this information from railroads regarding land grant rates, I wish you would tell us in what form you obtained that information, whether you obtained it by mills, or by destinations, or how?

A. Well, I obtained it from cement producing points to destination points, either by means of telephone, telegraph, or mail.

Q. Well, did the railroads provide you with any, or have they provided you with any tabulations of land grant rates?

A. Yes, sir.

Q. Do those tabulations show or contain rates
47028 from mills other than your own?

A. Yes, sir.

The witness identified Resp. Ex. 3625-A and B as an exchange of telegrams between R. G. Merrick, assistant freight traffic manager of the Atcheson, Topeka, and Santa Fe Railroad Company, Topeka, Kansas, and the witness, in regard to the quotation of land grant rates from Iola to Chillocco, Okla.; Resp. Ex. 3626 as a tabulation of land grant rates, dated May 18, 1933, which the Atcheson, Topeka and Santa Fe Railroad Company furnished to the witness for rates in effect on and after October 31, 1933 to destinations in Kansas and Oklahoma from producing points in Kansas, Oklahoma, Missouri and Nebraska.

47032 (RESP. EXS. 3625-A, 3625-B, and 3626, were offered and received in evidence.)

47033 By Mr. Seeley:

Q. Now, before leaving this subject, I want to ask whether, in bidding to the Federal government, in instances where you have used this control clause, so-called, since the N. R. A. Code period, or since you first adopted such a clause, did you or did you not consider—what did you consider with respect to giving the Government the benefit of the land grant rate?

A. We consider that by so bidding, we were giving the Government the full benefit of the land grant rate.

47035 Q. Mr. Moore, I want to ask, what is the difference, if any, between your method of bidding where you have bid with a control clause since the N. R. A. period, and the method of bidding which you used in these in-

stances where land grant rates were involved, prior to the Code period?

A. No difference.

Q. Mr. Moore, have you or any one in your company, too your knowledge, had any agreement with competitors to refrain from bidding f. o. b. mill?

A. No, sir.

Q. Mr. Moore, what has been the policy of your company with respect to price changes. First, I will ask you concerning a decline in prices, has your company given any notice, or given any protection to its customers?

A. Yes, sir.

Q. And what has been your policy, and how long has it been your policy in that respect?

A. Whenever we encounter a decline in prices, we notify our customers by the use of quotation forms what the new prices are.

47036 The witness identified Resp. Ex. 3627 A-D as Dewey quotation forms, containing the provision regarding protection of customers in case of decline in price which he testified about. Dewey's forms have contained such a provision for ten or fifteen years.

Q. Well, if you know, who drafted such provisions in your quotation forms?

A. Well, I have drafted all the quotation forms and contract forms for many, many years.

Q. At the time that your company allowed the new lower price to its customers, did you allow that price to customers to whom shipments had already been made?

A. Yes, sir, where there was a price decline we had a provision where, within five days after the price decline, a customer could book his order for shipments within fifteen days, and within that five day period, we gave

47037 the customers who had placed orders and those orders had been shipped within that period, the benefit of the reduced price.

Q. Does what you have just stated apply, did it apply to sales made on a so-called specific job contract as well as to other sales?

A. Yes, sir, the contract prices, the contracts provide a price, a maximum price, and further provide that in the event of reduction, the price in effect at the time of shipment shall obtain.

Q. And has your company been, has your company issued new invoices at the lower price in such cases?

A. Yes, sir, wherever that rule came into play we, in other words, where we had made shipments on a contract prior to the reduction of price within the five day period, why, we gave the customer the benefit of the reduction even though we had a contract at a higher price.

Q. Has that happened throughout the times you have been with the company?

A. Yes, sir, that is our common practice.

Q. And does it happen frequently or infrequently?

A. Well, there have been a great many general changes in recent years, but it did happen quite frequently, at certain periods.

Q. Now, you mentioned five days' period, did you?

A. Yes.

47038 Q. How did you arrive at that five days, Mr. Moore?

A. Well, that was a policy that was adopted by the Dewey Company to protect its customers, a good many years ago, and we always referred to it as the "five day clause" in our contracts, and quotations, and it is something that the Dewey Company originated, at least we claim credit for originating it, and something which I think other companies later followed.

In other words, prior to the adoption of that rule, it was possible at times of changes in price for competing customers to be charged different prices, one fellow might learn of that increase in price and he would stock up, and a competitor, at the same time, might not learn of it for some reason, and the first thing you know he would be trying to sell higher priced cement in competition with the fellow that had stocked up on low price cement, and in order to cure that situation and to improve our standing with the dealer trade, which we have always sought to cultivate, we adopted the rule, five day rule, so everybody could be protected in the case of price advance.

Q. By "everybody," you mean your customers?

A. Oh, yes, sure.

Q. Now, with respect to the other matter, the case of a price advance, Mr. Moore, what has been the policy of the company with respect to giving notice, if you do?

47039 A. Well, yes, in cases of price increases, where we find it necessary to increase our prices, why, we notify our customers of the increased price.

Q. And how long has that been your practice?

A. Ever since I have been with the company.

Q. And do you protect such customers at the old price, and if so, for how long?

A. Well, for their requirements, stock requirements shipped in fifteen days, they are protected at the old price for a period of five days from the time we give them notice of an increase in price.

Q. And do you set any limitation on the amount of cement that they can order?

A. No, anything that they can put in the warehouse during that period, why, we will be glad to ship it.

Q. And does your answer hold for the entire period that you have had that policy?

A. Yes, sir.

Q. And how long have you had this policy, or how long have you had the period of five days, that you referred to?

A. As I said, it runs back a good many years, I would say probably around 1914, or in that neighborhood.

47040 The witness identified Resp. Ex. 3628 as a printed copy of the House Organ "Dewey Doings" of the October 1, 1915 issue. That contains a notice on pages 8, 9, and also on the inside cover page to the trade by his company regarding the protection of the customers in the case of price changes. The date of that is October 1,

47041 1915; Resp. Ex. 3632 as a copy of the House Organ, "Dewey Doings", June 1, 1916 issue; Resp. Ex. 3633-A and B as photographic copies of pages 6 and 7 of that publication. Those exhibits contain the notice to the trade regarding Dewey's policy of this five day notice about which witness testified.

47042 The witness identified Resp. Ex. 3630 as a copy of the house organ "Dewey Doings", February 1, 1916 issue; Resp. Ex. 3631 as a photographic copy of page 3 of Resp. Ex. 3630.

47044 (RESP. EX. 3627-A and 3627-B was offered and received in evidence.)

47045 (RESP. EXS. 3629-A, 3629-B, 3631, 3633-A, and 3633-B were offered and received in evidence.)

By Mr. Seeley:

Q. Now, I want to know, Mr. Moore, whether the reasons which you gave as the reasons which prompted your company to introduce its five day notice in respect of price declines to protect your customers, about which you have

testified, obtained or did not obtain with respect to your reasons for instituting its policy of five days' notice in respect of price advances?

The Witness: Yes.

By Mr. Seeley:

Q. If you do not understand the question, I will ask you another question.

A. I understand it, I think, Mr. Seeley. The five day policy was to protect dealers in the case of advances. That was the main idea. Of course, if you had a contract and the price went down, why, you either had to reduce
47046 your price or you did not ship it, they did not pay any attention to that contract and bought cement from somebody else.

Q. Is that your experience?

A. Yes, sir.. This, so this is to protect dealers in price advances.

Q. Well, have there been cases, Mr. Moore, where your company did not learn of an announcement of price change and still protected your customers?

A. What do you mean?

Q. I mean, prior to the effective date.

A. Oh, yes. Prior to the effective date of the five day clause, there were times that we did not learn of price decreases or increases—price increases in time to protect our customers as against customers of some other manufacturer.

Q. Will you tell me what the practice of the Dewey Company is, Mr. Moore, in respect to changes in freight rates; that is, as far as your prices are concerned. First, you take the case of reduction in freight rate, or a decrease, let us say, in the emergency or other freight rate.

A. Well, if the reduction in freight rates brings about the reduction in destination prices, why, we are look-
47047 ing at the destination prices, and we have to meet in such reductions, regardless of how brought about, whether freight rate reductions or what, we are not governed so much by the fluctuations in freight rates, but we are governed by what the price is at the market, which is the destination.

The witness identified Resp. Ex. 3634-A to E as correspondence in 1930 between Dewey and Greenville Lumber Company, Greenville, Illinois, regarding credits for reduc-

tion in price; Resp. Ex. 3635-A to G as a file of correspondence between Dewey and a customer at East Alton, Illinois; Resp. Ex. 3635-B as an inter-department communication regarding credit for a reduction in price in 1930.

Examination by Trial Examiner Norwood.

47048 The witness testified that it referred to the reduction in price on shipments that had been made prior to a reduction in Dewey's price at the destination involved and said that it is less than five days prior.

Direct Examination by Mr. Seeley (Continued).

These papers represent the policy of Dewey in handling transactions of this character. The policy has not changed in that respect since he has been with the company and the answer obtains for the entire period up to July 1, 1937.

47049 *Examination on the Voir Dire by Mr. Wooden.*

Q. Referring to Exhibits for identification, Respondents Exhibits 3634-A to E, do those papers show the period of time following shipment on which you allowed the refund on guarantee against decline?

A. Well, I believe they do, Mr. Wooden. It shows that the shipment was made on November 22, 1930, and the price reduction took place on November 25, 1930, and of course, the adjustments that were made would reduce our price as of November 25, 1930.

Q. In other words, there was a two day guarantee in that particular case?

A. Well, it came within the five day period.

Q. Now, in this other case, Respondents' Exhibit 3635-A to G, there was a period there of thirty days, was there not, after shipment, within which you allowed the refund?

A. Yes. That was a special situation where we induced the customer to take cement that he did not want, in order to fill out a carlot.

Q. Now, referring to Respondents' Exhibit 3634-E for identification, there are quite a number of pencil notations and computations on that page. Can you explain those?

A. Apparently they are attempts of some one in our Davenport organization to figure back the price.

47650 Q. Figure back what, the basing point?

A. Figure back to the mill that was a basis for the price reduction. That is what it looks like to me, trying to determine what mill really made the price.

Q. Well, can you make out those notations other than the figures, themselves?

A. Well, "St. L." I would take it; means St. Louis.

Q. Yes?

A. That other looks like "Prosp."

Q. Is that Prospect Hill?

A. It might be.

Q. Is that St. Louis, or near St. Louis?

A. Well, it is in the switching limits of St. Louis, not in St. Louis.

Q. And what is the one above St. Louis?

A. I don't know.

Q. What is the one above that? Some kind of a "Dale."

A. I do not recognize that either.

Q. Do you know what these notations "United" and "212" and "L. S." and the "H."; what are they?

A. No, I don't.

Q. Would you say that the "L. S." was LaSalle?

A. It might be.

Q. And the "H" was Hannibal?

A. It might be. There is nothing opposite it in 47051 the way of a figure. It might be and it might not be.

Q. Is there "United", that word there? Can you make it out?

A. It does not look like it to me.

Q. You do not know what it is?

A. No, I do not.

Q. I do not either.

A. I don't.

Q. Is that word which I suggested might be "United," is it "Mitchell", in other words "Mitch," would you say that it was? Does that look like a "H" there to you?

A. It does not look like it to me. I do not think I have ever seen an "H" in that way. I do not see any "H" in there. I never saw one that looked like that.

Mr. Wooden: We object to all these exhibits as irrelevant, immaterial, incompetent, and unnecessarily accumulative.

47053 By Mr. Seeley:

Q. Now, Mr. Moore, Mr. Wooden's comment prompts me to ask you: what was your policy throughout this period with respect to the five day notice, or the five day protection of your customers in the event of a decline in price?

A. Well, I believe I testified that it was our custom and policy to meet the decline immediately and give the customer the benefit of the decline.

Q. Did you have any fixed rules at any time as to the exact time in which you would make this—in which they could make this request?

A. No, that has to be rather flexible, you have to satisfy your customers if you are going to continue to do business with them.

47054 Q. Does that apply on advances as well as to declines?

A. Yes, sir.

Q. Has that been your practice?

A. Yes, sir.

Q. Was it your practice, prior to this time, this period of 1930, that Mr. Wooden has spoken of, to do that?

A. Yes, sir.

Q. And was it your practice subsequent to this period?

A. Yes, sir.

(RESP. EXS. 3634-A, 3634-B, 3634-C, 3634-D, 3634-E, and 3635-A, 3635-B, 3635-C, 3635-D, 3635-E, 3635-F, and 3635-G were offered and received in evidence.)

47056 New York, New York,
Thursday, October 24, 1940.

47057 RAYMOND W. MOORE was thereupon recalled as a witness for the Respondents and, having been previously duly sworn, testified further as follows:

Direct Examination by Mr. Seeley (Continued).

Q. Mr. Moore, when we adjourned yesterday, we had reached the point where you had told us about the price leadership of your company in connection with the policy of protecting its customers in case of price changes, and with respect to the policy of your company in regard to the sales direct to dealers.

I ask you one further question on that: In connection with these various policies which your company in-
47058 stituted, did you or any of the officials of the company have any contact with your competitors before introducing those policies?

The Witness: Well, I had no contact, myself, and I saw none of the other officers of the company being in contact with any competitors.

47059 Q. Mr. Moore, if the Dewey Portland Cement Company had had any agreement or understanding with competitors in regards to these policies, would you have known about it?

A. Well, I feel that I would have known about it, owing to the fact that such matters are discussed by the officers of the company in conferences very frequently.

We are a small company and by that reason, the heads of the different departments confer very frequently on matters of policy as well as other matters.

Q. And do you recall whether you and the other officials of your company did confer and did discuss these policies, these five policies which you described yesterday, and which were set forth in the exhibit you identified as the roll of honor, prior to the time that you instituted these policies?

A. Yes, sir, we did.

47060 Q. Now, yesterday, in connection with these exhibits dealing with your policy concerning notice of

protection of customers in case of price changes, Mr. Wooden questioned you concerning the period of the number of days intervening.

I ask you, in case of competitors' announcements picked up by you which you decided to follow, when do you make your change effective in relation to the effective date of the competitors' change?

A. We make ours effective when we find it out.

Q. Is that then regardless of the effective date of the competitor's announcement?

A. Yes, sir.

Q. And has there been—how long has that been the practice of your company?

A. As long as I can remember.

Q. And was there any change in that practice at any time?

A. I do not recall any.

Q. During the Code period, does your answer obtain for throughout, including the Code period?

A. Yes, sir.

Q. Now, you said yesterday that in case of these price changes, you allow your dealers and have allowed them always to order any amount of cement they want for warehouse requirements within fifteen days, and you allow them the benefit of the old price for five days, at least, and
47061 in some cases more; is that correct?

A. No, I believe what I said, Mr. Seeley, was that we allowed them to take delivery of all the cement they could handle in their warehouses within fifteen days, but of course, the order for that cement would have to be placed within five days of the price change.

Q. And has that been your policy since this announcement, which you identified yesterday?

A. It has.

Q. Now, what has been the experience of your company as to when you begin to get the benefit of the new or higher price on shipments, generally?

A. Well, it varies, depending on how much the dealers stock up with the cheaper cement, and how many contracts we have that we have to protect the old price on. It is quite—generally, it is several months before we begin to see much of that increase.

Q. Coming to a new topic, Mr. Moore, I want to know what your experience was as to the terms of sale and dis-

counts, in particular the discount allowed on cement sales in the territory of your company when you came with the company?

A. Well, I just cannot recall exactly what it was in 1912.

47062 The witness identified Resp. Ex. 3636 as a printed pamphlet of Dewey's house organ, "Dewey's Doings" for December 1, 1915; Resp. Ex. 3637 as a photographic copy of page 9 of that publication. Resp. Ex. 3637 does not go quite far enough to refresh his memory as to the terms of discount of the Dewey Company. This is 1915.

He believes the question was in 1912 when he came
47063 with the company. This refreshes his memory as to what Dewey's terms of sale were in 1915. A change was made in its terms at that time but he does not know what the terms of sale, the discount prior to this time were. There has been some uncertainty in the terms of sale, as he recalls it, between 1912 and 1915. In other words, different companies were offering different discounts, and, as he recalls it now, this was Dewey's first official announcement of what position it was going to take in regard to discount. That is Dewey's first official announcement, he believes, of its position regarding discounts and was made three years after he came with the company; Resp.
47064 Ex. 3640 A to Z 1 as a file of correspondence between representatives of Dewey and a number of its customers, with answers from the company to some of the letters from the customers, regarding the change in marketing plans; Resp. Ex. 3640 Z 2 to Z 5 as correspondence relating to changes in prices in 1930 to some of Dewey's customers in Iowa. He believes it is just one customer at Green Bay, one customer in Iowa; Green Bay Lumber Company; Resp. Ex. 3640 Z 6 to Z 13 as documents pertaining to reductions in price at Depew, Illinois, and Walnut, Illinois in 1931 and announcements of marketing plan from some of the other companies. He understands that the papers in the files relate to terms of discount.

47065 By Mr. Seeley:

Q. Do you, Mr. Moore, recall any so-called Lehigh Selling Plan? I am referring to Commission's Exhibit 1131-J to M, Mr. Wooden.

A. Well, I recall a Lehigh Selling Plan; whether that is the same one you have in mind or not,—

Q. Well, do you recall a so-called Lehigh Selling Plan in 1930, or thereabouts?

A. Yes, sir.

Q. Did the Dewey Cement Company adopt any such plan?

A. No, sir.

Q. Well, if you know, what was the attitude of the Dewey Company toward that sales plan at that time?

A. Why, it was our firm conviction that the Lehigh plan at that time did not offer the dealers as much as we were offering them in our own plan, in effect at that time, and that had been in effect for a long time. We—

Q. Has the Dewey Portland Cement Company ever attempted to regulate or influence the dealer's margin on sales?

A. No, sir.

Q. Is this plan to which, which you say you recall, the Lehigh Selling Plan, is that the same plan, or has that been referred to, to your knowledge, as the "dealer's service plan"?

A. I have heard it referred to that way, yes.

47066 Q. And you say your company never adopted or carried into effect any dealer service plan?

A. We did not adopt this plan.

Q. Did the Dewey Company, to your knowledge, have any conferences or negotiations with dealers, groups of dealers concerning the alleged discontinuance of this Lehigh selling plan?

A. Not to my knowledge.

Q. Would you have known about it if the company did?

The Witness: I feel that I would have known about it.

By Mr. Seeley:

Q. Well, to your knowledge, has the Dewey Company consulated or communicated with the Lehigh Company, or any of the other competitors regarding your terms of sale or discount?

A. No, sir. We paddled our own canoe on that.

47067 Q. Has your company, to your knowledge, ever consulted or conferred with any group of dealers or dealer association regarding terms of sale or discount, or the Lehigh selling plan?

A. Not to my knowledge.

Q. Do you recall, Mr. Moore, a so-called compendium of

trade practices? I am referring to Commission's Exhibit 561.

A. I recall a compendium of trade practices. I do not know what that exhibit is. If it is the same thing I have in mind or not.

Q. Well, then, is this—I show you Commission's Exhibit 561, is that the so-called compendium that you recall?

A. Yes, sir, I recall that.

Q. Did the Dewey Company have any agreement or understanding to follow, or that it should follow practices, or any practices set forth in this compendium, Mr. Moore?

A. No, sir. It has always felt free to do as it pleased in regard to those practices.

Q. Well, did your company make any change in its practices to bring them into agreement with or as a result of this compendium?

A. No, sir. Our practices were more favorable to the dealers than those in that compendium, the way we sized it up.

Q. Did you, or any one in the company, to your
47068 knowledge, in the Dewey Company, Mr. Moore, make any use of this compendium?

A. Well, the only use I know we made of it, we read it and decided it did not add anything to help us so, paid no attention to it.

47069 (RESP. EX. 3637, was offered and received in evidence.)

47075 (RESP. EX. 3640-A, serially through 3640-Z, and 3640-Z-1, serially through 3640-Z-10, was offered and received in evidence.)

By Mr. Seeley:

Q. Now, coming to a new topic, Mr. Moore.

What classes of trade was the Dewey Portland Cement Company selling to when you came with the company, what types of customers?

A. Well, dealers, contractors, railroads, Governmental bodies, State and Federal.

Q. Was your company selling direct to those customers?

A. Yes, sir.

Q. Has there ever been any time since you have been with the company when you did not sell direct to those customers?

A. No, sir.

Q. Well, as to the classes of trade or the types of cus-

tomers that you have been selling direct, have they increased or decreased since that time?

A. They have increased.

Q. Well, as to your policy in selling to these types of customers, have you ever followed any so-called plan or classification of business?

A. No, sir.

47076 Q. I want to know, Mr. Moore, whether there was any change after you came with the company in the type of demand for cement, as to whether you had more orders for large quantities or for small quantities, and in order to answer that, I ask you what the situation was in 1912, whether any of your customers purchased cement in large quantities?

A. Well, by far, the greatest percentage of cement in 1912 was purchased by dealers. Some of the line yards purchased cement at times in considerable quantities for their various yards.

As I recall it, in 1912, there were not very many large contractors in the territory of the Dewey mill, which is the only mill we had at that time. The paving programs developed after that, very largely.

I cannot think of any large contract that we had, or contracts that we had in those early days.

Q. Well, in general, as to these customers other than dealers that you sold to direct, did they—what did you find as to whether they used or required the services that your dealers offer?

A. Well, the contractors generally require the service of a dealer, unless he is on an especially large job. The ordinary building contractor requires the services of a dealer in order to get deliveries in small quantities
47077 when he wants them, and has somebody take care of his bags for him, and return them, and carry his accounts for him, and regular dealers services.

I, in thinking about this, I recall also another type of customer that we sold direct in 1912 in large quantities, and that was concrete pipe manufacturers in Minnesota. They bought large quantities of cement from us in 1912 direct.

Q. Does your company sell direct to tile manufacturers?

A. Yes, sir.

Q. How long has that been the practice?

A. Well, we started that in 1912, I recall.

Q. You say you started it?
A. Yes, sir.
Q. You adopted that policy?
A. Yes, sir.
Q. You initiated that policy?
A. Well, I do not know as to that, but I know we started selling them in 1912.
Q. And you have ever since sold them direct?
A. Yes, sir.
Q. Now, after you came with the company, Mr. Moore, did you find any change in the demand for cement in respect to the quantities of orders?

47078 A. Yes, sir. There was quite a change in the demand brought about by large road paving programs and the Governmental building programs.

Q. Now, you told us the other day about the difficulties that your company experienced in connection with railroad equipment.
A. Yes, sir.
Q. Can you recall whether that had any effect on the quantity, on the size of the orders, after you came with the company?

47081 The Witness: Yes, I can recall that there was a progressive effort on our part in trying to obtain larger cars for handling the larger orders. It meant more economical loading expense on our part. Larger cars, of course, can be loaded considerably cheaper than a greater number of smaller cars, and not only did we try to use the larger type equipment on the large orders, but we tried to get our customers, our dealer customers to use larger cars because of the transportation tonnage making it necessary to use a lesser volume of

47082 equipment to take care of the trade; that is, our trade.

By Mr. Seeley.

Q. I want to know what the connection, if any, that policy and action of your company had with price, whether it had anything to do with your competitors, Mr. Moore.
A. Well, I do not think it had anything to do with price, at all. When we sold the cement, why, we were anxious to move it as quickly as we could to the satisfaction of our customers. It was just a selfish motive on our part. We thought before we moved, before we would have an opportunity to move.

Trial Examiner Norwood: Would the transportation cost per barrel be less in a larger car than in a smaller car, provided there is a minimum carload?

The Witness: No, not as a general rule.

Trial Examiner Norwood: That would not interfere, then, with figuring a delivered price?

The Witness: No, sir.

By Mr. Seeley:

Q. Does the Dewey Company—have you had the experience of shipping less than a minimum carload, Mr. Moore?

A. Oh, yes. We have frequently done that. We have what we call split cars, where we get orders from two or
47083 three different customers and load it in one car car with a stopover in transit privilege.

Q. Well, what did you find with respect to larger sized carloads which you mentioned, as to the attitude of your dealers, generally, toward larger cars?

A. Well, quite generally, they were willing to cooperate with us. They seemed to think that it was a pretty good idea to have the cement in stock instead of running the chances or not being able to get it.

Q. Now, did that period of emergency and shortage of carload equipment end, and—or—did there come a time prior to July 1, 1937, when that was not so important factor?

A. Yes, sir. As I testified the other day after the formation of the regional advisory board and the cooperation of it with the railroads, those conditions were greatly alleviated.

Q. Well, since that time what has been the—you are speaking now of a period when, Mr. Moore?

A. Around, prior to, around 1925 is when that first began.

Q. And since that time what has been the policy of the Dewey Company with respect to the size of the carloads that it ships or does not ship?

A. Well, we still tried to get our customers to take as big cars as they can.

Q. Why?

47084 A. We think it is an economic thing to do, loading costs are less; from our viewpoint, it saves us money.

Q. Has the Dewey Company, to your knowledge, had

any understanding or agreement with competitors in the computing or quoting prices based on any particular size carload?.

A. It has not.

Q. Do you recall, Mr. Moore, any distribution or sales policy of the Lehigh Cement Company in 1935, specifically, in February, 1935?

A. Yes, I have a faint recollection of that.

Q. How did you learn of that policy, Mr. Moore?

A. Well, through reports of it picked up by our salesmen in the field, and from our customers.

Q. Do you recall whether any of the other competitors of the Dewey Company issued a policy, a sales policy at that time?

A. As I recall it, a number of them did.

Q. Well, do you recall whether the Universal Atlas Portland Cement Company issued a policy in February, 1935?

A. That is the one I had in mind.

47085 By Mr. Seeley:

Q. Mr. Moore, did the Dewey Company, to your recollection, follow either of those policies of competitors that you mentioned, in February, 1935?

A. No, sir.

Q. Why, not, if you know?

A. Our policy was already more favorable to the dealers than those policies, as we viewed it, we saw no reason to make any change.

Q. Did the Dewey Company, to your knowledge, discuss that policy, or communicate with competitors, or communicate with them or with the Lehigh Company, or the Universal Atlas Company, or any other competitor, regarding these policies?

A. No, sir. Not to my knowledge.

The witness identified Resp. Ex. 3641 A to H as Dewey's regular business files of correspondence relating to the marketing plan which witness has just been discus-

47086 sing. They are letters from dealers, representatives of the company. The dates of the period covered are February and March, 1935.

47086 Trial Examiner Norwood: Does that state your policy?

The Witness: No, sir. We did not follow that policy. Ours was already better than that.

By Mr. Seeley:

Q. Do you recall, Mr. Moore, whether any of the competitors of the Dewey Company issued any statement of sales policy subsequent to this policy that you have just described for his Honor, the policies of February, 1935?

A. Yes, sir. I recall other statements of policy by other companies in April, 1935, I believe it was.

Q. Well, do you recall whether those policies were in any respect—I will ask you whether you had any conversations or communication from any of your dealers in respect to those policies?

A. Yes, sir. We had quite a few communications from our dealers in regard to those policies.

47087 Trial Examiner Norwood: Now, at this time, that you say your policy was more favorable than the others, you maintained it, you did not adopt the other policy?

The Witness: That is right. We maintained the policy we had had for a long time.

Trial Examiner Norwood: How long did that go on?

47088 The Witness: About, from February to April, the same year.

Trial Examiner Norwood: And then what did you do?

The Witness: Well, we found new policies issued by some of our competitors that were picked up by our representatives and sent in by our dealers which were more favorable to the dealers, and at least, that was the expression of our dealers, that they thought it was more favorable to them.

Trial Examiner Norwood: Than the policy you were then using?

The Witness: Yes, sir; so, following that, we modified our old policy to include the new features that the dealers thought so beneficial to them.

By Mr. Seeley:

Q. Now, Mr. Moore, I think you told his Honor that as to these policies of competitors, which you discovered subsequent to February, 1935, I think you said in April? Yes, sir.

47089 Q. That you met those policies in so far as your dealers considered them more favorable?

A. Yes, sir.

Q. And did you, or did you not, tell his Honor that you issued an announcement of policy in that respect?

A. I did not say that we had.

Q. Did you?

A. Yes, sir, we did.

The witness identified Resp. Ex. 3642 as the policy Dewey announced at that time, dated May 6, 1935. Dewey's dealers and customers told the company they were receiving announcements of policies from other companies. Dewey had not issued any written announcements of its policy, and Dewey's customers wanted to know what its policy was in this regard and if there was going to be any change in it, Dewey thought that in order to advise everyone what its policy was it had better issue an announcement, which it did. That was the occasion for the issuance of this policy.

47090 Q. We were discussing, Mr. Moore, the sales or distributing policies of your company, and such of your competitors' policies as you learned of in 1935, both the February policies and the April policies which you referred to.

Now, as to this policy which you identified as having been issued by your company in May, 1935, Respondents' Exhibit for identification 3642, which I want the record to show is identical with Commission's Exhibit 2386, I ask you the same question that I did with respect to the policies which you say you picked up of competitors in February; did the Dewey Company, to your knowledge, have any communications with the Lehigh Company, or the Universal Atlas Company, or any of the competitors who, you say you found, had issued policies in April, 1935, with respect to the method of sales or the marketing policy of your company, or of those competitors?

A. No, sir.

Q. Well, now, if your company, the Dewey Portland Cement Company had any agreement or understanding with competitors concerning these marketing policies, would you have known about it?

47091 A. Yes, sir, I think I would.

47092 (RESP. EX. 3641-A, 3641-B, 3641-C, 3641-D, 3641-E, 3641-F, 3641-G, and 3641-H, were offered and received in evidence.)

By Mr. Seeley:

Q. Mr. Moore, do you recall the Code of Fair Competition for the Cement Industry during the N. R. A.?

A. Yes, sir.

Q. Do you recall Article 11 of that Code?

A. Yes, sir.

Q. And the subject matter in relation thereto?

A. Yes, sir.

47093 Q. Or did relate to?

A. Yes, sir.

Q. I am referring to Commission's Exhibit 557.

Now, will you tell us what effect, if any, that Article 11 had upon your company, and your company's policy with respect to the customers or classes of customers, or types of customers that you sold to?

A. None whatever.

Q. Well, during the Code period, with respect to the practice of your company, in actual practice, its sales policy, did you or did you not continue the practices that you had theretofore?

A. We continued our same practices.

Q. Can you, Mr. Moore, identify for us Respondents' Exhibit 3643-A to P?

A. Yes, sir. That is a batch of correspondence in September, 1933, from our customers and to our customers; that is, certain of our customers, regarding the position of the Dewey Company in relation to the marketing under the Code.

Q. Is that the Article 11?

A. Yes, sir, that is Article 11.

Q. Were you personally familiar with the attitude of your company toward Article 11?

A. Yes, sir, the responses that we made to our
47094 customers to their inquiries regarding Article 11, the master response was drafted by myself.

Q. Well, tell me, did the Dewey Portland Cement Company, take any part or participate in the drafting of Article 11?

A. No, sir.

Q. Did it have any communications or conferences, to your knowledge, with competitors, concerning what should or should not be included in Article 11?

A. Not to my knowledge.

Q. Finally, did the Dewey Portland Cement Company have any agreement or understanding with competitors concerning a so-called classification of customers for embodiment in this Code of Fair Competition?

A. No, sir.

47098 (RESP. EX. 3643-A to P, was offered and re-
47099 ceived in evidence.)

By Mr Seeley:

Q. Mr. Moore, I am showing you again the policy which you identified as the announcement of sales policy issued by your company in May, 1935, Respondents' Exhibit for identification 3642, also appearing in this record as
47100 Commission's Exhibit 2386.

Will you tell us, Mr. Moore, in actual practice, since the issuance of that policy, what has been the practice of your company as to whether you follow that policy and how you follow it?

A. Has been the practice of our company to follow this policy, not rigidly, but as closely as possible, and times in order to meet competition, it is necessary to vary, but this is our standard that we attempt to follow.

Q. And does your answer obtain for the entire period between the issuance of that policy and July , 1937?

A. Yes, sir.

Q. And in deciding whether a given piece of business falls within one of the classes metioned in that policy, who interprets the policy in your company as to whether you will or will not sell to one of those customers?

A. Well, if there is any doubt about it, it is generally decided in conference between Mr. F. E. Tyler, myself, and the sales managers.

Q. And in interpreting your policy, have you ever,
47101 to your knowledge, has the Dewey Company ever consulted or communicated with any of its competitors?

A. No, sir.

Q. Have you or have you not felt free to exercise your own judgment as far as policy is concerned?

A. We have felt entirely free to exercise our own judgment.

Q. And do I understand that you have or have not deviated from that policy?

A. Not substantially.

Q. I was referring, Mr. Moore, to the sales policy announcement of your company and not to your policy of exercising your own individual judgment?

A. Well, that is what I thought you were referring to.

Q. Now, yesterday, Mr. Moore, you had occasion to

refer to work of the character of the so-called W. P. A. work, in connection with Commission's Exhibit 1063.

Will you tell us, please, what has been the experience of your company in respect to work of such character with a view to giving us, if you can, the reasons why your company, how your company, sells such work and the reasons why.

A. Well, we sell it through the dealers, the reasons being that the work is generally within the confines of the limits of some city or town where we have a dealer.

47102 The work, generally, requires delivery in small quantities on the job.

Trial Examiner Norwood: Isn't that the usual reason; is it necessary to go into that?

The Witness: There is one additional reason, your Honor, that I do not think I gave before.

Trial Examiner Norwood: Go ahead.

The Witness: And that is the fact of payment for cement furnished on W. P. A. projects is generally deferred beyond the discount period; that is a burden that the dealer carries.

Trial Examiner Norwood: The Government takes it any way?

The Witness: Yes, sir.

Trial Examiner Norwood: Takes the discount, any way?

The Witness: Yes, sir.

47104 By Mr. Seeley:

Q. You told his Honor yesterday, Mr. Moore, in response to a question, the type of services that your company rendered to dealers, and the leadership which your company exercised in adopting and instituting these services.

Now, I want to ask whether, in connection with your sales to concrete product manufacturers, the Dewey Company has rendered any services, and if so, what services?

A. Yes, it has rendered and is rendering services to concrete product manufacturers in the way of designing special mixes for them, different types of construction projects and research work for them.

Q. How long has that been the practice?

A. Well, ever since the concrete product plants have become active.

Q. And have those services increased or decreased since that time as rendered by your company?

A. I would say there were no less, probably about the same.

Q. What have you found as to how the services rendered by your company on these types of work compare with services of your competitors?

A. I do not know how to answer that.

47105 Q. What, Mr. Moore, has been the policy of your company with respect to sales to ready mix plants, has your company rendered any services in connection with such sales?

A. Well, yes, we have tried to develop business for those plants, one thing. We also have aided in obtaining information for them as to partiular types of mixes, also given them information regarding their use of add-mixes, which has been helpful to them.

Q. Now, I want to know with respect to such services, and also with respect to the services you described, which you just described, that your company renders for concrete products manufacturers, what has been the practice of your company, do you attempt to meet the services rendered by competitors, or do you attempt to go beyond it?

A. Well, we attempt to go as far, just as far as we can, to get the business. We attempt to, at least, meet what the others are doing, and if we can do a little bit more, maybe we will get the business.

47106 Q. What has been your experience as to whether you did do more and you did get the business?

A. Well, I know of times when we have done a lot and did not get the business; apparently somebody else did a little bit more.

47109 Q. Mr. Moore, will you tell us whether the Dewey Portland Cement Company is affiliated with any of the respondents in this proceeding? I am referring to Commission's Exhibit 3150-A to F, with particular reference to Commission's Exhibit 3150-C, and—

A. Do you mean in a corporate capacity?

Q. No. I want to know whether there is any stock or other connection between the Dewey Portland Cement Company and any of the other respondents in this proceeding.

A. No, sir. There is not.

Q. Any of the directors or officers of the Dewey Com-

pany who are directors or officers of any of the other respondents?

A. No, sir.

Q. Mr. Moore, has the Dewey Portland Cement Company, to your knowledge, ever declined to quote to
47110 any state Government on cement requirements, or business, within the usual marketing area of the Dewey Company?

A. No, sir.

Q. I am referring to Paragraph of the Commission's complaint alleging the inability of State Government to get competitive bids.

I want to know now, Mr. Moore, whether you recall, or if you recall whether the Dewey Portland Cement Company made any bid to the Illinois State Highway Department in January, 1932?

A. Yes, sir. I know we did make a bid at that time.

Q. Mr. Moore, has the Dewey Portland Cement Company, to your knowledge, had any understanding or agreement with any competitor concerning the price to be quoted or the price that you did quote or would quote for bulk cement?

A. No, sir. Not to my knowledge.

Q. I am referring to Commission's Exhibit 2171.

Well, tell us briefly, Mr. Moore, what has been the policy of the company and whether there has been a change in the policy of the company with respect to the price for bulk cement?

A. Well, we have sold bulk cement at five cents less than our price for cement in bags. It has been our policy for a good many years.

Q. Well, you said yesterday, I think, in answer
47111 to one of his Honor's questions, in connection with the exhibit which his Honor ruled out, showing your bulk shipments, that you had found the cost of bulk cement, you had found that it was cheaper in some cases to load bulk cement; is that correct?

A. Yes, sir. That is true.

Q. Well, how did you—I want to know how the cost compared with respect to this five cents, which you say you allowed, less than your package cement.

47113 The Witness: Our loading costs of loading bulk cement averaged approximately four cents a barrel less than the loading cost for loading sack cement, and

which was the reason for our allowing or making a price on bulk cement five cents less than sacked cement; in other words, it was to cover and apply the saving that obtained in loading bulk cement.

Trial Examiner Norwood: Well, wasn't there a time when you allowed ten cents?

The Witness: Yes, I think there was a time.

Trial Examiner Norwood: Well, at that time, did that represent a difference in the cost of loading?

The Witness: Well, the costs have varied, your Honor.

47114 I would say probably that that did not, ten cents was probably considerably more than the saving that we made at any time.

By Mr. Seeley:

Q. Now, I want to know, Mr. Moore, whether the five cents difference that you referred to as allowing consumers, five cents reduction on bulk cement, how that—I want to know whether that occurred or existed at this period that Mr. Wooden has referred to in 1932, whether that is the same period that you were talking about?

A. Yes, sir.

Q. Now, I asked a moment ago regarding a bid of the Dewey Portland Cement Company on the Illinois Highway requirements of January, 1932.

I show you Commission's Exhibit 1184, and ask you if this exhibit sets forth the bids of the Dewey Portland Cement Company on the letting to which I have referred.

47115 A. This exhibit, apparently, is a recapitulation of bids on the letting to which you referred, including prices which may have been taken from the Dewey bid.

Q. Mr. Moore, to your knowledge, has the Dewey Company made any prices to any State Highway Departments lower than the then current published prices to the commercial customers of the Dewey Company?

A. It did.

Mr. MacIntyre: Was the time fixed on that?

By Mr. Seeley:

Q. With reference to the exhibit which you hold in your hand, Mr. Moore, to your recollection, did the Dewey Company make any prices to the Highway, the Illinois Highway Department which were lower than the then current published prices of the Dewey Company?

A. Yes, sir, it did.

Q. And with what result, if you know?

A. Well, I do not think there was any result any different from what we had been experiencing when we bid the same price as we did to our other customers at destination.

In other words, we did not get any more cement by, as a result of our lower bid, than, in percentage, of the amount covered by the bid than we had received before.

Q. I would like to ask your experience, generally, Mr. Moore, with respect to the Highway Department or other customers to whom the Dewey Company has made
47116 prices or quoted prices less than their then current published prices to commercial customers?

A. Well, our general experience is that we do not get any more business when we quote reduced prices.

Q. Mr. Moore, showing your Respondents' Exhibits for identification 3645-A to R, I will ask you what they are, if you know?

A. That is Exhibit 3645-A to Z-17?

Q. A to Z-17, I should have said instead of "R."

A. It is copy of our Illinois price list effective January 4, 1932.

Q. Do those papers contain the record of the current commercial prices of the Dewey Company at the destinations in Illinois, at that time?

47117 A. Yes, sir.

Examination on Voir Dire by Mr. Wooden.

Q. These letters that are on the first sheet of this exhibit, what do they mean?

A. Those are the initials of employees of the company that received copies of the price list.

Q. Why is it that this sheet bears the date, 4-2-32, whereas the list was effective 1-4-32?

A. Well, the date 4-2-32 is the date when this was typed. The prices became effective January 4, 1932.

Q. You mean that there was no Illinois price list until April?

A. No.

Q. 1932?

A. No, I do not mean that. I mean that the prices stated in that price list became effective January, 1932.

Q. I understand these were your regular commercial delivered prices?

47118 A. Yes, sir.

Q. At these destinations?

A. That is right.

Q. And were they not the equivalent of somebody's base price plus freight to the respective destinations?

The Witness: Well, I could not say whether they all do or not. It is whatever we found the price at destination that we had to meet.

By Mr. Wooden:

Q. Wouldn't you say that, so far as you know, they were the equivalent of a base price plus freight?

A. I would not say that, Mr. Wooden, they may be.

Q. You would not say the other, either?

A. I would not say either way, without checking them.

Q. You never have checked them?

47119 A. No, I have not, personally checked that price list.

(RESP. EX. 3645-A serially through 3645-Z, and 3645-Z-1, serially through 3645-Z-17, was offered and received in evidence.)

47127 By Mr. Seeley:

Q. Now, Mr. Moore, can you state whether the Dewey Company did or did not increase its prices in the month of July, 1933?

A. It is my conviction it did.

Q. And can you state wether, with respect to Respondents' Exhibits for identification 3649-A to D, that change in your prices was made before or after you learned

47128 of these competitors' quotations?

A. After.

47132 (RESP. EXS. 3648-A to H, 3648-J to L, and 3649-A to D, inclusive, were offered and received in evidence.)

By Mr. Seeley:

Q. Mr. Moore, have your quotation forms contained any clause, any so-called clause with reference to the route of the shipments?

A. Yes, sir.

Q. How long have your quotation forms contained such a clause?

A. Since shortly after I went with the company.

Q. Do you know who drafted the clause in your quotation forms?

A. Yes, sir.

Q. Who did?

A. I did.

Q. And have you made any change in that clause since you say you drafted it?

47133 A. No, sir.

Q. Has this clause with respect to the route, had anything to do with your policy which you told us about regarding diversions of shipments in transit, Mr. Moore?

A. No, sir. That clause was formulated before we had any difficulty with diversions in transit.

Q. I am referring now to Commission's Exhibit 200, and the testimony at record page 33186.

Has the Cement Institute ever communicated with your company, to your knowledge, Mr. Moore, or made any suggestions or recommendations concerning this control-route clause?

A. No.

47134 Q. Well, Mr. Moore, did the use of this clause, by your company—was this clause used by your company, the use of this clause, based on any understanding, or was there any understanding or agreement with your competitors regarding this clause?

A. No, sir.

Q. You mentioned this morning, Mr. Moore, the matter of the policy of your company in regards to urging your customers to use larger carloads in order to expedite service.

I want to know now whether the freight rate compilations of your company have ever contained any information concerning carload weights?

A. Generally, no; very few exceptions.

Q. Well, what has been your experience as to the presence or lack of such information in your freight rate compilations?

A. Well, we have considered it would not be necessary to have any information regarding minimum weights in our freight rate compilations as we look to the lowest freight rate that we can find in the tariff, regardless of the minimum weight attached thereto.

Q. Has that practice ever been otherwise?

A. No.

47138 Mr. Seleey: I offer in evidence Respondents' Exhibit 3653 for identification.

(Handing the same to Mr. Wooden.)

Mr. Wooden: I would like to ask a question or two.

Trial Examiner Norwood: All right.

Examination on Voir Dire by Mr. Wooden.

Q. Whose letter is this, Mr. Moore?

A. I stated it was a letter written by our vice president and general sales manager to one of our salesmen.

Q. Mr. Gray?

A. Mr. Gray, Walter Gray.

47143 By Mr. Seeley:

Q. Mr. Moore, has the Dewey Company, since 47144 you have been with the company, issued any price based upon or related to any constant figure at its Dewey, Oklahoma, mill?

A. Yes, sir. It did.

Q. When, if you recall, was that?

A. Around 1933, I believe, around there some place.

Q. Well, did you have any conversations with Mr. Tyler, Mr. F. E. Tyler, prior to the establishment or issuance of those prices?

A. Yes, sir. A number of them. I conferred with him at quite some length.

Q. And did you, as a result of those conferences, decide to issue those prices?

A. Yes, sir.

Q. And what was your experience, briefly, tell us as a result of those prices that you issued?

A. Well, we did not experience the sensation of getting any more business from those points than we had been getting normally prior to the time we made the price reductions.

Q. That was your experience?

A. Yes.

Q. Did you, subsequent to that time, issue new prices which reflected a change in that relationship to your Dewey, Oklahoma, mill?

A. Yes, sir.

Q. And that was the reason for that, Mr. Moore?

47145 A. Well, we found we were not getting any more business than we had gotten before, and the business we were getting, we were getting less revenue from it, so we did not see any object in maintaining the prices any longer.

Q. Have you ever had any—has the Dewey Company, to your knowledge, ever had any agreement with any competitors, that it would or would not establish any mill base at either of its mills?

A. No, sir. It has not.

Q. Well, have you ever had any agreement or understanding—I am speaking now of the Dewey Company—to maintain any particular price level in the area around your mill or around any other mill?

A. No, sir. We have not.

Q. Well, if the Dewey Company had had any such agreement, would you know of it, Mr. Moore?

A. Yes, sir.

Q. Now, Mr. Moore—

A. Yes, sir.

47146 Q. Has the Dewey Company had any customer, Mr. Moore, at Moline, Illinois, called the Moline Consumers Company?

A. Yes, sir.

Q. And has the company had any customer in Davenport called Builders Lime and Cement Company?

A. Yes, sir.

Q. Do you have or have you had any customer in Davenport called Mueller Lumber Company, Davenport?

A. Yes, sir.

Q. Mr. Moore, did those dealers that I have inquired about, or have those dealers sent information in to your company regarding prices of competitors?

A. Quite often.

47147 Q. Can you state whether the change in prices, and prices of the Dewey Portland Cement Company, July, 1932, occurred prior to or after the receipt of these quotations?

A. After.

Q. Did the Dewey Portland Cement Company have any agreement with competitors concerning the advance in its price in July, 1932?

A. No, sir.

Q. Did it, to your knowledge, have any contact or com-

munication with competitors regarding this price change, either prior to the time that you changed your prices, or subsequent to the time you changed your prices?

A. Not to my knowledge.

Q. Well, can you, Mr. Moore, identify these papers for us as to what they are, and the sources of them, and the dates?

48148 A. Yes. They are quotations dated in July, 1932.

Q. What dates are they? You might just give us the dates and whose quotations they are, if you will.

A. Well, there is one from Alpha Portland Cement Company, July 18, 1932; one of July 16, 1932 from Marquette Cement Manufacturing Company; one dated July 18, 1932, from Lone Star Cement Corporation, Indiana; one dated July 18, 1932, from Alpha Portland Cement Company, and one dated July 1, 1932, from Universal Atlas Company.

Q. You say "from," from whom to?

A. To our dealers at Davenport and Moline, Illinois.

47149 Q. Now, will you tell us, Mr. Moore, in bidding
47150 f. o. b. mill, which you described to us, yesterday, has the Dewey Company ever had any agreement with competitors to bid an f. o. b. mill price based upon, or related to the, to any destination price?

The Witness: No, sir.

By Mr. Seeley:

Q. The record shows his Honor inquired of you concerning trucking, as to whether the laws which you identified for us in Oklahoma and in Davenport, Iowa, were the only laws concerning trucking.

The record does not show whether your answers pertained to your own market territory, or whether it was more general.

Will you tell us what is the fact?

A. Well, I understood from his Honor's question regarding Davenport, that he had reference to Oklahoma laws, and as to Dewey, I mean to say as to Davenport the laws pertaining to the City of Davenport, and that was to what my answer was directed.

There were, of course, other laws, State laws, in Iowa, referring to motor vehicles and their operation in the State of Iowa, which, however, did not enter into
47151 this particular picture.

Q. Well, do I understand that your answer per-

taining to the laws affecting trucking with which you had experience in your company's sales?

A. Yes.

Q. Making your company sales?

A. Yes.

Q. Has the Dewey Portland Cement Company ever had any agreement, looking to the standardization of specifications, I mean, agreements with competitors, Mr. Moore?

A. Not to my knowledge.

47152 By Mr. Seeley:

Q. Just tell us with respect to these forms, Mr. Moore, which you have described for us, as having been drafted by you, did you ever take into consideration any forms issued by The Cement Institute or by any competitor, in drafting or in issuing the forms of your company?

A. I did not. I drafted the forms, myself, to suit our own needs as I saw them.

47157 *Cross-Examination By Mr. Wooden.*

Q. Now, Mr. Moore, referring to the questionnaire of Clarke and Burns, which related to your company, just what part did you have in the preparation of those questionnaires?

A. I sat in at conferences between myself, Mr. F. E. Tyler, and Mr. Ward, in which the questionnaire was considered, and some of the answers worked out, some of the details had to be worked out by Mr. Ward from the books, he being the auditor of the company.

Q. Well, when the questionnaires did not involve figures, but merely general information, what part did you play in making the answers?

A. Well, I was consulted as to what the answers should be. In my capacity with the company, they seemed to come to me about everything.

Q. In other words, you at least reviewed and passed upon the answers made, giving general information in those questionnaires?

A. Yes, sir.

Q. Had they previously been filled out at the
47158 Dewey or Davenport mills for some of the information?

A. No, not previous to our conference.

Q. Now, you said a few moments ago, that you thought that base price at your Dewey Mill was put in about 1933?

A. That is as I remember it.

Q. As a matter of fact, wasn't it put in in 1932, as indicated by your questionnaire, or Clarke and Burns questionnaire, Commission's Exhibit 976-12-K.

(Counsel hands paper to witness.)

A. The document you show me, Mr. Wooden, I do not think is the document at all that we filled out. It is not in the handwriting of any of the parties that had to do with the filling out of the questionnaire.

Q. Well, it is typewritten, isn't it? There is some handwriting there, but that handwriting is not in evidence, apparently, the handwriting of the Profesors, or their assistants.

A. Well, of course, I cannot recognize the typewritten figure as being made in our office. The whole thing does not look like it came from our office in this form.

Q. Well, of course, it is a photostat.

A. Well, I realize that, but it does not look like the original ever looked like that.

Q. Well, at any rate, it does not show and never did show that it was 1933 that you had a base at Dewey, does it?

47160 Q. As a matter of fact, you are not at all sure that you had a base price in effect at Dewey, Oklahoma, in 1933, were you, Mr. Moore?

A. Yes, I am just pretty sure of that, Mr. Wooden.

Q. Do you know when it was put in?

A. Well—

Q. How do you fix 1933?

A. Well, because I know that that is when we were working on the proposition. We considered it for some little time before we finally decided to put the prices in, and after this case began, why, I had occasion to look up my original record, and that is as I recall it, the prices went in, in 1933, as I remember it.

Q. What date?

A. I do not remember the exact date.

Q. What month, what month?

A. But I would say in March, something like that, as I remember it.

Q. And how long did they remain in?

A. Well, they, for quite some time, I believe, over a year.

Q. Do you mean to testify that you had a base price at Dewey, Oklahoma, from March, 1933, into some time in 1934?

47161 A. That is may recollection of it, yes, sir.

Q. And you are quite sure of it?

A. I am pretty sure of it.

Q. Do you mean to testify now that Mr. Ward did not submit the questionnaires and answers to questionnaires, of which Exhibit 976-11-C to 976-12-K is a photostat?

A. Well, they do not look right to me, Mr. Wooden.

Q. Submitted to Clarke and Burns, I mean.

A. No, sir. They do not look right to me. I do not think this is what he submitted.

Q. Why don't you think he submitted those?

A. Well, because I do not recognize his handwriting, where there is handwriting on these copies, and as I recall, the return that we made to Clarke and Burns did have a lot of the questions answered in the handwriting of Mr. F. E. Tyler, and Mr. Ward, and I do not see that on any of these.

Q. Did you keep a copy of the questionnaire that you submitted to Messrs. Clarke and Burns?

A. We surely did.

Q. Did you make attempt to check it with the one that is in evidence before you arrived?

A. I had not seen this before.

47162 Q. What is the answer to my question, did you make any attempt to check the copy that you kept in your office with the one that is in evidence in this case, not this photostat copy that I am showing you.

A. No. I did not make any attempt to check it against anything. I did not have anything to check it against.

Q. You did not know that you were going to be asked about it?

47163 A. No, sir.

Q. Will you send in to the Examiner the copy that you retained?

Mr. Seeley: I object, your Honor.

By Mr. Wooden:

Q. In your office?

Mr. Seeley: I object. Counsel knows that the question should be properly addressed to counsel for respondents.

Trial Examiner Norwood: I think he may ask the witness that.

Mr. Leisure: I direct the witness to refer all inquiries of that kind to counsel.

Mr. Wooden: I know he will. You do not need to direct him. I know he will.

Trial Examiner Norwood: Well, wait a minute.

Do you direct that question to the counsel?

Mr. Wooden: I direct it to both the witness and the counsel.

Mr. Leisure: Well, you may continue to direct, Mr. Wooden, as long as you please.

Trial Examiner Norwood: I will ask the counsel if they will produce that?

Mr. Leisure: We will take it under consideration.

47164 By Mr. Wooden:

Q. I am asking the witness, that so far as he is concerned, subject to the advice of his counsel, if he is willing to send that copy that was kept there of the Clarke and Burns questionnaire, send it to your Honor for checking.

Trial Examiner Norwood: Answer the question.

The Witness: I will have to be guided by advice of counsel.

Trial Examiner Norwood: You refuse to answer that?

The Witness: Yes, sir.

47165 Q. I want to ask you again, Mr. Moore, whether it is your testimony that Mr. Ward did not send in to Professors Clarke and Burns the report in answer to the questionnaire of which Commission's Exhibit 976-11-C to 12-K is a copy, excluding the handwritten notations upon it.

Mr. Leisure: I object to the question on the ground it has been asked and answered twice.

Trial Examiner Norwood: The objection is overruled. Answer it.

The Witness: May I have the question read, please?

Trial Examiner Norwood: Read it.

(Question read.)

The Witness: My firm conviction is that that is not the report that Mr. Ward sent in.

By Mr. Wooden:

47166 Q. After you take off or exclude the handwritten notations on it, it is your testimony that you believe Mr. Ward did not supply the information that is contained upon this document?

A. I do not understand that is the question you asked.
Q. That is another question.
A. Oh, well, I do not know as to that. I would have to compare the two documents.
Q. And you never did that?
A. No, I never did that.
Q. You are testifying here from a belief that you might have readily determined by comparison of the document, and without making such comparison?
A. I had no occasion to make a comparison.
Q. But I am still not clear, Mr. Moore, whether you intend to testify that Mr. Ward did not send in the
47167 information that appears in typewritten form on these documents.

The Witness: Well, your Honor, I said I have no way of knowing whether that is the same information sent in or not, and I would not be able to know until I check it against the one that we did send in.

Trial Examiner Norwood: Read the question again.

(Question read.)

Trial Examiner Norwood: Will you testify that he did not do that?

The Witness: I do not know whether he did or did not.

By Mr. Wooden:

Q. And is that the same,—is your answer the
47168 same when applied to Commission's Exhibit 976-3-G to 4-A, inclusive, which is the questionnaire for the Davenport mill.

(Counsel hands paper to witness, who examines same.)

A. Yes, sir. My answer is the same.
Q. All right.

Isn't it a fact, Mr. Moore, that the base price at your Dewey,—Oklahoma mill, was discontinued in July 1933?

A. I do not think so.
Q. You can't fix the month, though, in which you say it was discontinued?
A. No, I think it was in 1934.
Q. Was it discontinued after the Code went into effect?
A. Yes, that would be after the Code went into effect in 1934.
Q. And you still say it was discontinued after the Code went into effect?
A. That is the way I remember it.

Q. That base price at Dewey, Oklahoma, was put in by a competitor before you put it in, wasn't it?

A. No, sir.

Q. Didn't any competitor ever put in a base price at Dewey, Oklahoma?

A. No, sir.

Q. It is your testimony that the Dewey Company,
47169 itself, put in the base price at Dewey, Oklahoma, and did it before any other competitor used Dewey, Oklahoma, as a base?

A. Yes, sir.

Q. What were the reasons that led you to put in a base price at Dewey?

A. Some of our competitors were shipping into our nearby territory pretty heavily, and we conceived the idea that if we reduced our prices in that territory, that we might get some of the business, but we were fooled, we did not.

Q. Were any of them reducing their prices near Dewey to a point or to a level which practically made Dewey a base?

A. No, sir. Our price cut the destination prices as much as six cents a barrel.

Q. What base price did you put in at Dewey?

A. As I recall it, we had several during that period of time.

Q. Well, what would be the range?

A. Well, I think one was $1.75 f. o. b. Dewey.

Q. Cloth?

A. Or that was—yes, in the cloth.

Q. All right. How low did it go?

A. Well, I think it went as low as $1.50.

Q. In cloth?

A. Yes, as I recall it.

Q. Is that the lowest you can recall?

47170 A. Well, it just seems to my mind that it went a little bit lower than that, although I cannot be sure about that.

Q. Did it go as low as $1.50 in cloth, just before it went out in 1934, or when was it that it went that low?

A. It seems to me that is about when we stared with it.

Q. When?

A. At $1.50.

47171 New York, New York
Friday, October 25, 1940.

47172 RAYMOND W. MOORE was thereupon recalled as a witness for the Respondents and, having been previously duly sworn, testified further as follows:

Cross-Examination (Continued) by Mr. Wooden.

Q. Mr. Moore, have you given any further thought to the matter that I asked you about yesterday afternoon; namely, the production of the duplicate copies of the Clark and Burns questionnaires, which you retained?

A. No, sir.

Q. Where are those questionnaires, the copy that you retained.

A. The last I saw of them, they were in our 47173 office at Kansas City.

Q. And when was that?

A. That has been several months ago.

Q. Are they still there?

A. I do not know. As far as I know, they are.

Q. They were not sent to counsel for the Institute?

A. I do not think so.

Mr. Wooden: May I ask, Mr. Seeley, whether or not you have had or do have those questionnaires that the company retained?

Mr. Seeley: Your Honor, as Mr. Leisure stated yesterday, we did not and do not have the papers that Mr. Wooden is referring to, in the hearing room, and we have not to date discovered any such papers in our files.

We took the matter under advisement and further search is being made.

I, personally, did not go downtown to our office, and have not looked into the matter carefully.

Trial Examiner Norwood: Yes?

Mr. Wooden: Do I understand that that means you do not have copies of them here?

Mr. Seeley: We do not. We did not have any copy yesterday, and we do not have any today.

As far as we know we do not have such copies.

47174 By Mr. Wooden:

Q. This base price at Dewey, Oklahoma, that was in effect for some time, Mr. Moore, what were the reasons that led you to put in a base at Dewey?

A. Well as I testified, the reason was we found that competitors were shipping heavily into that territory, compared with the consumption in the territory. We thought that we should have more of the business nearer the mill, and we had an idea if we reduced the price, perhaps we could get more of that business.

Q. Well, couldn't you have reduced the price right at those particular destinations without putting in a base that made a maximum for all your business out of Dewey?

A. Well, I presume we could have. We were free to do it if we—

Q. What were your reasons for putting in the base then rather than merely meeting the competition of mills that were shipping into Dewey's local territory?

A. We thought that was the way to achieve the ends that we aimed to achieve.

Q. How large a territory did the Dewey base cover, the Dewey base price?

47175 A. Well, it ran south, as far as Sapulpa, Oklahoma, which is about a hundred miles, and about, I would say possibly one hundred twenty-five miles east and west from Dewey, east and west from Dewey.

Q. You mean one hundred and twenty-five miles east, or each way?

A. No, I mean the area was about one hundred and twenty-five miles across.

Q. In other words, the radius was approximately half that. It went around that whole district?

A. Well, I think, Mr. Wooden, possibly—no, you can't say that because Dewey is located just about fifteen miles south of the Kansas border, and this area extended south, southeast and southwest from Dewey, owing to the way the railroad lines radiated.

Q. Dewey did not control anything up in Kansas?

A. No, the Kansas mills still controlled there.

Q. Did the Dewey territory stop right at the state line, or where did it stop?

A. Well, Independence, Kansas, was controlling prices at the state line, as I recall it. It was only something

about twenty miles from the state line, and the state line was just about midway between Dewey and Independence.

Q. Well, did you have, so to speak, an arbitrary delivered price in effect north of Dewey and south of the state line?

47176 A. No, it was made the same way there as it was made south of Dewey. It was made on our own base plus our freight.

Q. Your base plus freight made the lowest delivered price in that territory?

A. Yes.

Q. Did you have a price of one dollar twenty-five cents in effect at Dewey in June, 1932?

A. I cannot say.

Q. Net after deduction of packages and discount?

A. I cannot say that we did.

Q. Did you have some correspondence, did your company have some correspondence with Professors Clark and Burns regarding explanations of the information that you furnished in your questionnaires?

A. Well, I believe we did have at least one communication from them.

Q. Did you handle that?

A. No. I am somewhat familiar with it, though.

Q. Did you see the reply that was made to Professors Clark and Burns, concerning information requested by them in explanation of your questionnaire answers?

A. I do not believe I saw the reply before it was made.

Q. Who made it?

A. As I recall, our auditor made it, Mr. Ward.

Mr. Wooden: I would like to ask counsel if they
47177 will produce the letter which Mr. Ward wrote in, wrote to Professors Clark or Burns in response to Commission's Exhibit 971-13-D?

47178 Mr. Seeley: I certainly do not have any such papers with me.

Mr. Wooden: Well, I am not asking you if you have got them here. I am asking you if you will undertake to produce them, the reply to Commission's Exhibit 971-13-D.

Trial Examiner Norwood: I will ask the counsel if he can to give him as early an answer as he can on it.

By Mr. Wooden:

Q. Now, Mr. Moore, I understand you to testify that you excluded any information concerning minimum weights of cars from your freight compilations; is that correct?

A. I said with very few exceptions.

Q. And you also testified that you sought to induce your dealers to use as large cars as possible?

A. Yes, sir.

Q. As a matter of fact, you have made quite a
47179 number of shipments, have you not, in cars that were larger than the minimum?

A. Oh, yes.

Q. Have you made some shipments in cars as heavy as eighty thousand pounds?

A. Yes, sir.

Q. Have you shipped into, from Dewey into Kansas City, in cars of that size?

A. Yes, sir.

Q. Of course, you get the benefit of whatever lower rates there might be on the heavy car, do you not?

A. Not necessarily.

Q. Well, you get a lower rate if there is one, don't you, when you ship in such a car?

A. Not necessarily. The relation of the rate to Dewey, to what we get for the cement, does not bear any relation to the rates in effect.

Q. That compared to what you would get if you shipped in a smaller car with a higher rate, you would get the benefit, don't you?

A. Well, I do not think we would ship in a smaller car at the higher rate. I do not think it is necessary to meet competition in order to do that.

Q. But if you were to ship in a smaller car, you would have to pay a higher rate, would you not, say, into
47180 Kansas City, than you pay when you ship in an eighty thousand pound car?

A. No, sir.

Trial Examiner Norwood: Why isn't that the case, why? Your competition forces you to use a large car?

The Witness: Oh, no. The minimum, the rate applies to a minimum fifty thousand pounds, to Kansas City, and if we ship more the rate is still the same.

By Mr. Wooden:

Q. But there is a lower rate on an eighty thousand pound car than a fifty thousand pound car into Kansas City?

A. No, sir.

Q. Never was?

A. No, sir, not to Kansas City, Missouri.

Q. You mean to say that there are no lower rates anywhere from Dewey on an eighty thousand pound car than on a fifty thousand pound car?

A. You did not ask me that.

Q. Well, I am asking you now.

A. There is a lower rate to Kansas City, Kansas, but we do very little business to Kansas City, Kansas.

Q. Have you shipped an eighty thousand pound car there?

A. I cannot recall having shipped any, because we do very little business; the business in Kansas City,
47181 Kansas, is largely controlled by the plant at Bonner Springs, which is only seventeen miles away.

Q. But you shipped an eighty thousand pound car into the territories where you got a lower rate there obtaining on eighty thousand pound car than on the fifty thousand pound car?

A. I think we shipped some very small quantity.

Q. Your price in such localities, however, was based on the minimum-weight car, wasn't it?

A. I do not think so.

Q. What was it based on?

A. On the lowest price of any competitor in that delivery.

Q. Can you name any points at which your delivered price was not the equivalent of some base price plus freight, on a minimum size car.

A. Yes.

Q. All right.

A. Raytown, Missouri, within the Greater Kansas City area; Dodson, Missouri, within the Greater Kansas City area.

Q. Do you mean within the switching districts of Kansas City?

A. Yes.

Q. As a matter of fact, there was an arbitrary deliv-

ered price, so to speak, in that switching area, wasn't there?

A. At times.

47182 Q. Outside of that territory, can you name any points where your delivered price was not the equivalent of some base price plus freight figured on a minimum weight car?

A. Yes, sir.

Q. All right.

A. Oklahoma City, Oklahoma.

Q. Is that also the case of an arbitrary price there, like Kansas City?

A. Well, it is a price that did not check back, as far as I know, to any base.

Q. It is in the same category, in that respect, isn't it?

A. Yes, I think so.

Q. Well, outside of points like that, where there is a switching area around and where arbitrary prices prevail, can you name any point where your delivered price was based upon some base price plus freight in a maximum weight car?

47183 The Witness: May I have it read, your Honor? It seems to me like it is not clear, at least I did not understand it.

(Question read.)

The Witness: What do you mean by a "maximum weight—"

Q. Well, I mean, when it is based on weights other than minimum.

A. I cannot understand your question.

Trial Examiner Norwood: Now, will you kindly tell me whether or not, as the usual thing, those prices figure back to some base price plus freight in your territory outside of these cases where there is a blanket price for a city, or something like that?

The Witness: Do you have in mind dealer prices?

Trial Examiner Norwood: Yes, sir.

47184 The Witness: Well, those dealer prices—I think that is true.

By Mr. Wooden:

Q. Now, in those cases, is the delivered price based on anything other than the minimum weight car?

A. Well, our delivered price is based on something else?

Q. Is it the equivalent of anything other than the base price plus freight in a minimum weight car?

Trial Examiner Norwood: Answer the question.

The Witness: Well, I do not know how to answer the question.

Mr. Seeley: Is what the equivalent?

Mr. Wooden: The delivered price to dealers at these points where he says it is the equivalent of base price plus freight.

I am carrying it just a step further.

47185 Trial Examiner Norwood: I think the witness understands what the examining counsel wants to know. I am going to ask him to answer.

The Witness: Well, our price, as I said, is the lowest price that we found in the market.

Now—

Trial Examiner Norwood: But you said that it was based on, ordinarily, the price to dealers was based on some base price plus freight.

Mr. Seeley: No, your Honor.

Mr. Brick: No, Judge.

Trial Examiner Norwood: Wait a minute. I will get along with the witness.

Is that what you said?

The Witness: Well, I said that those prices might check back that way.

Trial Examiner Norwood: Yes, that is what I said, were the equivalent of some base price plus freight, that is right.

The Witness: I think that is right.

Trial Examiner Norwood: Now, is that freight on which the price is based, just the rate that is quoted for the minimum, say, fifty thousand pound car; is that correct?

The Witness: Well, I can't say that, your Honor;
47186 because in checking back any prices like that, we did not pay any attention to the minimum weights. We just used the rate, the lowest rate we could find to check that.

Trial Examiner Norwood: Well, would that be—

The Witness: Now, the general rule is that the rates in effect, or based upon a minimum weight of—through the years, it has varied from, well, twenty-four thousand pounds up to thirty-eight thousand; and forty-four thousand and fifty thousand pounds.

Trial Examiner Norwood: Well, that would be under the carload. What is the minimum car?

The Witness: Well, there are exceptions, but they set as minimum today—the standard minimum today if fifty thousand pounds. Now, we frequently—

Trial Examiner Norwood: Now, the rate quoted for that, isn't that the rate that appears in most of the prices?

The Witness: Well, not necessarily, your Honor, because there are still in effect varying minima, although—

Trial Examiner Norwood: You check back and you find some prices that are based on the fifty thousand pound car rate, and some are based on the eighty-five thousand?

47187 The Witness: Not eighty-five, I do not know of eighty-five.

Trial Examiner Norwood: Eighty?

The Witness: Well, I think there is only one point that I know of, and we excluded that, whether if eighty-thousand pound minimum, and that is the greater Kansas City area, but now we frequently make shipments, as I testified yesterday, in split cars.

In other words, we have shipment for two or three customers in the same car.

Now, one customer might only get fifty barrels, another one might get a hundred barrels, and on those, why, we apply our carload price at destination and allow the carload freight rate deduction.

There is where we sell less than carload quantities and allow the carload rate.

Trial Examiner Norwood: But that was the fifty-thousand pound car rate, wasn't it?

The Witness: Yes, generally so.

Trial Examiner Norwood: Don't you use that as a basis for figuring?

The Witness: No, whatever our price was, I can't say as to the destination.

Trial Examiner Norwood: Well, you do, or you do not use the fifty thousand pound car rate that is quoted

47188 for forty thousand pound cars, you do or do not use that to check your prices by and find that is the rate that is used in the majority of cases; is that right?

The Witness: No, we do not use any minimum at all to check our prices.

By Mr. Wooden:

Q. Now, Mr. Moore, isn't it a fact that when you find through your salesmen or customers that a changed delivered price is in effect at some destinations, that you check that at a number of destinations, and figure back to find out what the base price is, reflecting those changes, and then do you not apply that base price to other destinations by adding freight?

A. Yes, that is the general process.

Q. And isn't the freight that you add to the other destinations, the freight on the minimum weight of the car?

A. It is the lowest freight that we can find.

Q. Well, isn't it on a fifty thousand pound car?

A. No, not uniformly, sir.

Q. In a majority of cases?

A. Well, it may be in a majority of case. I would have to make a count, as I said, the standard minimum is fifty thousand pounds, but there are so many exceptions to that.

Q. You check, as I understand it, your freight mills with the Institute freight rate book?

47189 A. Occasionally.

Q. Haven't you found that the Institute books were based on a fifty thousand pound car minimum?

A. No, I have not found that.

Q. Have you found otherwise; have you found that they were not based on a fifty thousand pound car minimum?

A. Well, we did not pay any attention to the minimum in the—

Q. Then, you do not know whether they are based on fifty thousand pound minimum, or not, is that your testimony?

A. I do not know, that is my testimony as far as the Institute rate books are concerned, yes, sir.

Q. And you are a traffic expert who has checked the Institute books with your own freight compilations, you cannot tell whether the Institute books are based on a fifty thousand pound car minimum, or not?

A. Well, as I said, we made so little use of the Institute freight rate books they just did not mean anything to us.

Q. Then, in the course of your checking, you did not ascertain, you, a traffic expert, did not ascertain whether they were based on fifty thousand pound minimum or not?

A. I was not paying any attention to it. I was looking for the lowest rate, that is all I looked for.

Q. But, Mr. Moore, in getting the lowest freight
47190 rate, don't you have to take into account what the minimum weight of the car was?

Trial Exainmer Norwood: Now, tell us that directly, if you will, please, sir.

The Witness: Yes, sir, I say, you do not have to refer to the minimum weights in order to determine the lowest rate freight. They are carried in different sections of the tariff.

By Mr. Wooden:

Q. Didn't you say a few minutes ago, Mr. Moore,
47191 that there was a lower rate on eighty thousand pounds than on fifty thousand pounds in some territories?

A. Sure, I said that.

Q. Then, how can you determine what the lowest freight rate is unless you determine what the weight to which it is appiled is?

A. Because I happen to know where that territory is. It is only the small territory adjacent and intermediate between our mill and Kansas City, Missouri, that that applies.

Now, I have worked with those rates from the time they were prescribed by the Interstate Commerce Commission, and I do not have to refer to tariffs for that.

Q. Do you mean to say, however, that it is not necessary to take into account what the minimum weight of a car is when you are considering the lowest rate?

A. It is not necessary for me to do it.

Q. Because you already know it; is that it?

A. Well, it is because we do not pay attention to the minimum from, in connection with rates, from other mills.

Q. Well, do you only consider the rates from other mills for pricing purposes, not for shipping purposes; don't you?

A. Well, the rates from other mills, that is the only possible use we could make of them would be to determine the, what mill we may check back to a particular price.

Q. Well, Mr. Moore, if you were merely following
47192 delivered prices at destination, as you pick them up in the field, you would not have to know even the freight rates from competing mills, would you, all you have to go by is the competing price?

A. Well, it is impossible to pick up every price in our

destination marketing area, thirteen or fourteen states. We pick up enough to let us know what the situation is.

Q. How would you know how to meet competition of some other mill at destination, so far as price was concerned?

A. Well, we would make—

Q. Let me finish my question.

A. Pardon me.

Q. Unless you took into account whether the freight rate from that mill was on a minimum weight car or on a different rate, on a lower rate, on a higher weight car?

A. It would not make any difference to us what the rate from the other mill was. We would have to meet the price at destination, and ship the minimum car. If the minimum car was involved, that applied to our rate to that particular destination.

Q. Yes, but for pricing purposes, you do figure on the rate from your mill?

A. No.

Q. You do not?

A. No.

47193 Q. Didn't you just testify a few minutes ago, after you found out what the base price was, you then added freight from that base to the destinations where you did not have the information?

A. That is not the same thing.

Q. I do not understand why it is not.

A. I do not see it the same way.

Q. Well, now, let us start again, then. When you figure back and get a base price and then add the freight from that base to many destinations where you did not have information, what freight do you add, do you add the minimum carload freight of fifty thousand pounds?

A. No, we add the lowest freight rate we can find from that particular producing point.

Q. For any sized car?

A. Yes.

Q. And you find that that gives you a lower delivered price than the base mill that you started to figure from?

47194 The Witness: No, I do not recall having found that situation.

By Mr. Wooden:

Q. Well, unless you use the same freight rate on the

same sized car, you would have a different delivered price, wouldn't you?

A. Well, as I see it, that is a rather hypothetical case. I do not believe there are many rates in our territory at least, where there is any other minimum from competing mills, other than fifty thousand pounds.

Our situation, where these different minima come into play, is on account of the gas belt mills reaching into the Kansas City market.

Q. You can't give me any destination, can you, where the delivered price is the equivalent of some base price plus freight in a car other than fifty thousand pounds?

A. Yes, sir, I don't know what the situation is today, but I know the price in Kansas City has been made at times on basis of a minimum of eighty thousand pounds from Bonner Springs.

Q. When?

A. And we were shipping against that on a minimum of fifty thousand pounds.

Q. And when did that occur?

A. Well, I know it has been in the past, oh, seven

47195 or eight years.

Q. Didn't that occur during 1931 or 1932?

A. Well, I just guessed at it, seven or eight years. That would make it about right.

Q. Is that the last you, the latest that you can fix that time?

A. Well, yes, that is as near as I can come to it, just offhand.

Q. Is your routing clause that you said you prepared, did you ever compare it with the routing clause that was suggested in matter put out by The Cement Institute?

A. Well, I do not recall exactly. I may have compared it. We have that routing clause quite a while. It would not be unusual if I did compare it.

Q. You do not claim there are any material differences between your routing clause and the one suggested by The Cement Institute?

A. I do not know.

Q. Well, you said you had compared them, I thought.

A. No, I said I might have compared it. I did not recall having compared them, but it may be that I did.

Mr. Seeley: If your Honor please, in order that the record may show what routing clause is being referred

to, would Mr. Wooden be good enough to identify the particular routing clause?

47196 Trial Examiner Norwood: I think the witness understands what he is referring to, do you not, Mr. Moore? Do you understand what he is referring to?

The Witness: I understood he was referring to our routing clause, and our quotations forms, and our invoices.

By Mr. Wooden:

Q. You testified to making an increase in your prices in July, 1933.

A. Yes, sir.

Q. What was the amount of that increase?

A. I do not recall specifically.

Q. Was it twenty-five cents a barrel?

A. The same answer.

Q. Did you have a base price in effect either at Dewey or Davenport when you made that price increase?

A. Yes, I testified yesterday that it was my recollection we had a base price at Dewey during 1933.

Q. Can you cite any instance where your company increased wages of its labor during 1932 prior to the increased price that you put in effect in July, 1932?

47197 A. We increased our wage scales immediately upon signing the President's re-employment agreement, and before that time, we had been progressively increasing our wage scales. We have had the reputation of maintaining higher wage—

Q. Just a moment.

A. —scales than our competitors.

Q. I do not want your reputation. I want an answer to my question.

Mr. Wooden: Read the question, please?

The Witness: Well, I cannot give you specific date on which we made wage increases.

Mr. Seeley: May we have the question?

Trial Examiner Norwood: Read the question.

(Question read.)

Mr. Leisure: Now, I ask that the witness be allowed to complete his answer without interruption from counsel.

Mr. Wooden: He has not even started his answer.

Trial Examiner Norwood: I will ask the witness to answer that factually, and not in the terms of what the reputation was.

Mr. Wooden: And he has gone, about 1933, your Honor. I did not ask him about 1933.

The Witness: I cannot.

By Mr. Wooden:

47198 Q. Can you cite any instances during 1933 prior to the increase in price you put into effect in July of that year, where you increased the wages of your employees?

A. No, not specific instances. I know we were making increases all along that period, but I cannot give you the specific information.

Q. It is your testimony that you were making increases in your wage rates during 1932 before you made your increased price in July of that year, and you were also increasing wages during 1933, prior to July 1?

A. Yes, sir.

Q. Can you state the dates and the amounts of those increased wages, wage rates during those periods?

Mr. Leiserson: I object to that question. It has already been answered once, and Mr. Wooden would not allow him to tell him exactly what his information was. He did not want to hear that answer. Now he asks him again for the exact dates, and the witness has said, "I cannot give you that."

Trial Examiner Norwood: The objection is overruled. Answer it.

The Witness: I can't give it.

By Mr. Wooden:

Q. Is it your testimony that prior to July 1 1933,
47199 you increased the hourly wage rates of your employees?

Trial Examiner Norwood: Was that your testimony?

The Witness: Yes, sir.

By Mr. Wooden:

Q. Is it your testimony that you were increasing wages during 1932 and 1933, notwithstanding the conditions of business, and the general business conditions, and regardless of what your competitors were doing?

A. Yes, sir.

Q. Do you mean to say that your competitors also increased wages during 1932 and 1933, prior to July of that year?

The Witness: I do not know what our competitors were doing.

By Mr. Wooden:

Q. You say you increased wages during that period without regard to what your competitors were doing?

47200 A. Certainly, and I can give you the reason, if you want it.

Q. All right. Give us all you can about it.

A. Well, we were having labor unrest at Dewey, all during that period. The Dewey plant was the first plant in the gas belt group that the labor unions picked on to organize, and for two or three years before they were able to get a majority of our employees into the union, there was labor unrest and we were attempting to satisfy our employees by giving them higher wages and better working conditions, and everything that went with an attempt to satisfy labor.

Those conditions, as far as I know, were not experienced by the other gas belt mills.

Q. Will you present to the Examiner a written statement giving the dates and the amounts of wage increases that your company put into effect during 1932, and up to July 1, 1933?

A. I will have to be governed by the advice of counsel.

47201 Q. Now, referring to this Illinois price list, Respondents' Exhibit 3645, and which was effective January 4, 1932, that was your destination price to dealers, was it not?

A. Yes, sir.

Q. And do I understand that in submitting bids to the Illinois Highway Department in early 1932, you departed from that commercial destination price?

47202 A. That is my recollection, we did.

Q. Did you make a reduction of a certain amount applicable at every destination on the State Highway bids that year?

A. I do not recall that we did.

Q. Do you recall what the basis of your reduction was, or the nature of it, the amount of it?

A. My only recollection on that is that the amount of the reduction was gauged on information that we had and I think that came about through former biddings as to what our judgment was of the probable competition we would have to meet in that bidding. It is just a guess.

that is the way I remember it, as to what the competition would be.

Q. Is it a fact that you made a reduction in those bids of sixteen cents a barrel at every destination for which you bid?

A. I do not recall it that way, Mr. Wooden.

Q. Was it some flat sum?

A. The way I recall it, it was varying sums. I might be mistaken, but that is my recollection of it.

Q. And were those bills all rejected on that bidding?

A. Well, sir, I can't say. There was a number of bids rejected, but whether that was one or not—I rather believe it was.

Q. You do not know whether you were low in that bidding, or not?

47203 A. No, I do not know that.

Q. Do I understand that that was the only state in which Dewey bid less than its commercial price to State Highway Departments?

A. Well, I can't be certain, but I believe we did bid in Iowa.

Q. What year?

A. Well, I can't say. I am just thinking of the situation at that time, generally.

Q. In other words, you think it was 1932 you bid low in Iowa, lower than commercial?

A. Well, it was during that period where there seemed to be more numerous cuts in, under our standard delivered price than are usual. There was a period in there, of, oh, two or three years where the reduced prices or preferential price, whichever you want to call them; that it, the prices below the dealers price were being made in order to meet competitive conditions.

Q. Well, as I understand it then, all you can name are Illinois and Iowa; that is, states where you did cut below your commercial prices?

A. Very many of those states, Mr. Wooden, did not take bids directly. I know the State of Oklahoma did at one time, though I cannot say the time, but most of the road programs, as I recall it, in our territory, were

47204 awards to contractors and the contractors bought the cement.

Q. Even at that time, 1932 and 1931?

A. Well, that is the way I recall it.

Q. Well, regardless of whether it was handled through contractors or not, can you name any other states than Illinois or Iowa, where the Dewey Company cut below its commercial prices on bids to State Highway on State highway business.

Mr. Seeley: Excuse me. Could I inquire whether that question relates to sales, contractors sales for the state highway departments?

Mr. Wooden: Yes, of course.

Mr. Seeley: Well, thank you.

The Witness: Well, I said Oklahoma, in addition, Mr. Wooden.

By Mr. Wooden:

Q. You did cut in Oklahoma?

A. I said I was sure—

Q. Below your commercial delivered prices?

A. Yes, I am sure we cut there.

Q. And about this same time?

A. Yes, and even after that. We have cut to contractors in Oklahoma below our commercial price in order to meet competition. We are doing that today, as far as that matter goes.

Now, the State of Kansas, as I recall it, did not 4720 buy cement direct for road work. I think, as I recall it, all that cement was through contractors, and there we have the same situation I just described in Oklahoma.

We have had to make lower prices to contractors on these big road paving jobs than our standard market price in order to meet competition.

Q. Do you just take the contractor's word for it when he says he has got a lower price than you make, or what do you do?

A. Well—

Q. In order to verify his claim?

A. Well, our experience has been that generally, if you do not take the contractor's word for it, you do not get the business, he buys from some other cement company, so we have come to put a great deal of reliance on what our contractor customers tell us, especially contractors that have been doing business with the company for years.

Q. And there is a marked contrast, isn't there, between your policy and practice in respect to contractors in that regard and what it is in regard to dealers?

A. I do not think so. We make whatever price we think is necessary to get the business, and meet competition.

Trial Examiner Norwood: Well, as to making the exceptions from the regular price?

The Witness: Well, Your Honor, it is necessary
47206 to make some exceptions in the regular price to dealers, especially the large line yards.

Trial Examiner Norwood: Do you make it in as many cases as you do with bids to contractors?

The Witness: Well, I would say just about the same number of cases.

By Mr. Wooden:

Q. What proportion of your contractors get better than your commercial delivered prices?

A. Well, I cannot say as to the proportion, but whenever it is necessary to make a reduction in order to get the business, why, we make the reduction. We do not take any chances on losing business.

Q. In other words, it is the size of the order rather than the fact that he is a contractor; is that it?

A. No, no. It is not. Because we have cut prices under our going price even to a dealer for one car order if we thought it was necessary.

Q. When have you done that?

A. Well, it has been all through the years, ever since I have been there, twenty-eight years.

Q. Do you mean to say that since 1932 and prior to July, 1937, that you have cut delivered prices to dealers frequently?

A. Yes, sir, you bet.

Q. How frequently?

47207 A. Well, whenever it was necessary in order to get the business, and that is—

Q. Well, how frequently?

A. Well, that is quite often. In percentage, I could not tell you, but I know it is quite often that we have to do it.

Q. Do you mean to say then that these delivered prices that you worked out to give to your salesmen, that you worked them out and find that you cannot meet the competition by quoting those prices?

A. Yes, they are maximum prices, the most we hope to be able to get. Those are subject to variation wherever

it is necessary to reduce them in order to meet competition.

Q. Do you mean to say that these delivered price lists which you worked out and give to your salesmen, that you do not use them to quote prices for your dealers?

A. I did not say that.

Q. Well, I am asking you now.

A. No.

47208 Q. Then, your testimony is, I take it, that you do put these delivered prices that are compiled in your delivered price list?

A. I say we quote them.

Q. Yes.

A. But that is not any indication that we are going to be able to get that price.

Q. Now, you try to get it?

A. Sure, we try to get all we can.

Trial Examiner Norwood: Then, do you permit them to higgle with you about the price you finally ——

The Witness: Sure, yes, indeed.

Trial Examiner Norwood: You finally come to their terms, sometimes, and sometimes they come to yours?

The Witness: Sure, that is right. Yes, sir. That is the way it is done.

By Mr. Wooden:

Q. And are you there referring to what, to principally the big line yard buyer?

A. Oh, no. I am referring to our whole trade.

47209 Q. Any dealer, in other words, can get a lower price than this quoted price?

A. If he can convince us that we have got to meet the reduction in order to get his business, yes.

Q. And do you take his word for it, like you do in the case of a contractor, or how do you verify what he has to say on that subject?

A. Well, we use our own judgment. We do not think that our customers that have been with us for years are going to try and take advantage of us.

Q. You take their word for it, in other words?

A. Yes, we take their word for it, very largely. There might be some condition that we would not be satisfied that he would be able to get a better price, and that has happened, we have acted on that sort of an opinion of the

matter, and we have lot his business, and that proved to us that we were wrong.

Q. Between July, 1933 and July, 1937, what proportion of your dealer trade was sold at less than your regular quoted destination prices?

A. I have never made any figures. I could not say.

Q. Well, without regard to figures, can't you say whether it was ten per cent. or twenty-five per cent., or what?

47210 Trial Examiner Norwood: Can you estimate that? (Addressing the witness.)

The Witness: No, I would not want to, Your Honor. It would be just a guess out of the air. I do not think it would be worth anything.

By Mr. Wooden:

47211 Q. Would you say that ten per cent. of your dealer business was done during that period at less than your regular quoted price?

A. I would not say any per cent. unless I had an opportunity to check the records.

Q. Would you say that ten per cent. of your dealers in number of dealers get lower than your regular quoted delivered prices?

The Witness: My answer is the same, Mr. Wooden. I could not.

By Mr. Wooden:

Q. It might be ten per cent. or it might be fifty, you don't know?

A. That is right.

Q. As a matter of fact, you were really not in position, as not being the sales manager, to answer such questions, are you?

A. Well, I am pretty familiar with what they do in the sales department. I have to be.

Q. Will you produce and present invoices to dealers, both lime yards and non-lime yards between 1933, in July, and July, 1937, which would establish the fact that

47212 you were making to them lower delivered prices than your regular quoted prices.

A. Well, Mr. Wooden, I would have to first say that I would have to be governed by advice of counsel. But I want to add that the invoices, themselves, would not prove anything because adjustments are made after the ship-

ments are made, and the cement is used, and adjustments come about when you start paying for the cement.

Q. Well, I would include, of course, anything that affected the particular sale.

A. Well, then, I would say that I must be guided by advice of counsel.

Q. Why would you make a later adjustment and change the price at which you took the order?

A. Well, through necessity. If the customer pays for the cement and deducted a differential or a figure less than we had invoiced him for, and refused to pay us for it, why, we would have to charge it off, we could not afford to sue him because we would lose his business.

Q. Well, I mean a voluntary reduction in price by your company after your had taken it at another figure, what would be the circumstances that you do that?

A. Well, just as I said.

Q. That would not be voluntary?

A. Well, it is voluntary in the sense that you do 47213 not sue him and try to force him to pay. You cannot do that.

Q. Are these cuts to dealers that you have been talking about, what you call secret price cuts?

A. Well, we do not publish them, naturally, to the world. They are whatever is necessary to meet competition as we see it.

By Trial Examiner Norwood:

Q. You never cut below the price you find at a definite location, then, do you?

A. Sometimes that is necessary, yes, sir, because they claim they have got even a better price yet.

Q. Well, in a case like that, do you announce it to the trade, then, that price?

A. No, sir. It might not be necessary.

Q. You consider that just one transaction?

A. Yes, sir. That is right.

By Mr. Wooden:

Q. Well, there are, you say there are no noticeable differences between the conditions you have just been describing after July, 1933, compared with what they had been during 1931 and 1932?

A. Well, I know it was all throughout the whole period that was done, even through the Code period, where it was necessary to meet competition.

Q. And you say there was no noticeable differ-
47214 ence between conditions in that respect in 1931 and 1932, and what they were after July, 1933?

A. Well, to answer that I would have to know what the situation was in each year. I cannot carry all that in mind for twenty-eight years. I do know, however, that when I first went with the company that was the situation, and I know it has continued all through the twenty-eight years, and still is the situation today.

Q. And your answer then is that you cannot see any difference between conditions about which you have been testifying prior to or during 1931 and 1932, and what they were after July, 1933; is that correct?

47215 The Witness: Yes, that is right. The only difference would be in degree.

By Mr. Wooden:

Q. That is what I am asking about.

A. And I can't give you the degree differences.

Q. You have noted no difference, substantial difference in degree?

A. No, sir, I—

Q. In other words, there was just as much of this price concession going on under the N. R. A. Code as there was during 1931 and 1932?

A. It certainly was going on under the Code.

Q. And just as much?

A. And since.

Q. And just as much as it had been during 1931 and 1932?

A. Well, I do not know as to whether just as much or not. I cannot answer that.

47216 Q. Well, anyway, there wasn't any substantial difference?

A. Well, I cannot answer that. I do not know what you mean by "substantial", for one thing.

Q. Well, I am putting myself in your hands. You will have to define the word "substantial," yourself.

A. Well, I can't do it.

Q. I am willing and will have to take your definition of the word "substantial."

A. Well, I have said—

Trial Examiner Norwood: Was there any noticeable difference?

The Witness: Well, I think there was less during the Code period.

By Mr. Wooden:

Q. You were violating the Code, were you?

A. No, sir. We were meeting competition.

Trial Examiner Norwood: Under the Code, could you meet a price which your customer said had been given to him that was under the filed price for that destination?

The Witness: We thought we could in order to meet competition.

Trial Examiner Norwood: Could you proceed that way, meet the competition, and their report it, or what would you do; that is, what did you do in actual practice?

The Witness: Well, that is the way we did, we
47217 met it and then filed it.

By Mr. Wooden:

Q. Did you file with the N. R. A. Code Authority, all the cut prices that you referred to?

A. Well, I can't say that we filed them all. As I remember, there was a great number of them when that situation came to light, immediately the price went down at that market, and became the price that was filed with the Code Authority. I cannot just—

Q. Isn't it a fact, Mr. Moore, that after July, 1933, and under the N. R. A. Code, that there were very few changes of price filed with the Code by your company, or any other company out in that territory?

The Witness: Well, I do not know how many we filed, but I do know that we met competition in a number of cases in just the way I have described, and complaints were made to the Code Authority that we were violating the Code, and we had to defend ourselves before the Code Authority, which we did on the basis that we were meeting competition. That is the way we always understood
47218 that we could operate, as far as that is concerned.

By Mr. Wooden:

Q. As a matter of fact, you then did, a lot of price making during the Code period, without reporting to the Code Authority what the prices were?

A. Well, we did not do any price-making outside of the Dewey situation.

Q. Well, I am talking about—

A. We simply met prices that we found had already been made.

Trial Examiner Norwood: Or that you thought had already been made?

The Witness: Yes, had a reason to believe had already been made.

By Mr. Wooden:

Q. You now say that not only Dewey but your competitors were making prices below the filed prices under the N. R. A. Code?

A. Well, at least we had pretty good evidence that they were doing it, yes, sir.

47219 Q. Now, with regard to the change in the bulk differential from ten cents to five cents; that took place in August, 1932, didn't it?

A. I do not believe I said, Mr. Wooden. I don't know that I had that in the date in mind as the date of the change. There was a change made, however, about that time. I know that.

Q. That amounted to an increase of five cents per barrel on bulk shipments, didn't it?

A. Well, unless it was modified by some condition at the market.

Q. You mean it did unless it did not?

A. Well, I mean it did result in an increase unless there was some other element that entered into the price at the destination.

Q. Was Dewey meeting competition when it put into effect the same change?

A. Yes, sir.

47220 Q. Do you know who initiated that change?

A. No.

Q. Do you know why it was done?

A. Well, I can only surmise that it was done to meet the demand of the States, contractors on large road paving projects.

Q. You mean that contractors wanted an increase of five cents a barrel in the bulk?

A. Oh, I thought you meant the establishment of the differential on the bulk.

Q. I am talking about the change from ten to five cents.

A. Oh, the increase. No, I do not know why that was done. Do you mean as far as we are concerned?

Q. I am speaking generally, then if you want to speak to Dewey also—

The Witness: Well, I do not know the reason for the other company, what the reason for the other company was, but I know our reason was that we found that other

companies were taking that action, and as we have always done, we tried to get all we can for our products,
47221 and we took the same action after the others had already started.

By Mr. Wooden:

Q. Why didn't you make a secret cut on that like you did on some of these others?

A. It was not necessary, because that was an open change.

Q. As a matter of fact, just about that time, there was a big road building program with Federal appropriations to back it, put into effect, wasn't there?

A. There had been large building programs right along, Mr. Wooden. I do not know that that was any larger at that time than before, or since, but I know that there was a large program in Iowa when we were building our Davenport plant, and it began prior to the time we built our plant.

That is one reason we went ahead when we did.

Q. I am talking about 1932 now.

A. I know, but I said there were large Government programs all during the year—

Trial Examiner Norwood: Now, you do not have to tell him anything except to answer his questions. You leave it to the lawyer.

The Witness: All right.

Trial Examiner Norwood: To tell other things that would be interesting and might enlarge the picture.
47222 You leave it to your counsel to do that.

Answer the question.

Read the question.

Mr. Leisure: Can we have the answer read, too?

Trial Examiner Norwood: Read the question and the answer.

(Record read as requested.)

Mr. Wooden: All during the year?

Trial Examiner Norwood: You asked with respect to the particular time he mentioned.

The Witness: I cannot answer that, your Honor.

By Mr. Wooden:

Q. Well, it was on road building projects, was it not, that bulk delivery became much more important than it had ever been on deliveries to dealers?

A. Are you speaking of the same period of time?

Q. Yes.

A. I think that is true.

Q. In other words, very few dealers take delivery in bulk; isn't that true?

A. Well, relatively few.

Q. Now, with regard to your testimony concerning Dewey Company's policy on diversions in transit, I understand you had that policy and practice of trying to prevent diversions by your consignees for many, many years?

47223 A. Yes, sir.

Q. As long as you have been with the company?

A. Well, yes, or shortly after I went with them, at any rate.

Q. Isn't it a fact that diversions by one dealer into another dealer's territory caused a good deal of back-fire, so to speak, on you from the dealer whose territory was invaded?

A. Yes, sir.

Q. Weren't such invasions usually at a cut price in the invaded dealer's territory?

A. Well, of course, I do not know what a dealer that took the cement into the other dealer's territory sold it for. We would not have any record of that.

Q. But as it came to you from your complainants, complaining dealers, wasn't that brought to your attention that it was?

A. Well, that was one of their contentions, that he was able to take the business away from the local dealer in his own market.

Q. At a cut price?

A. Well, that is one of the things that they said.

Q. And didn't that situation there, in that invaded dealer's territory, result also in pressure from them for you to reduce your price there so that they could

47224 meet that competition?

A. Well, there might have been some request made at that time of that kind. I would not be surprised if there were.

Q. In other words, this diversion in transit then had some potentiality of affecting your delivered price in the invaded dealer's territory, didn't it?

A. Yes.

Q. Now, just what have been the changes in your policy and practice at Dewey and Davenport with regard to trucking? What changes have taken place?

A. Well, our policy still is to load its truck. We are still doing it, I think.

Q. Well, do you mean to say that there has been no change in the policy and practice at Dewey and Davenport with regard to trucking?

A. We have tried to discourage trucking at, as much as possible, for the reasons that I gave on my direct testimony.

Q. How did you try to discourage it?

A. Well, by telling our customers that we would rather they would take rail delivery, or some other delivery.

Q. But that they could determine that, you would do whatever they wanted, did you take that position?

47225 A. Well, if they insisted, we continued to load trucks, and we are still doing it today where they insist.

Q. Do I understand then that there have been no changes in our practice or policy at Davenport or Dewey regarding loading for truck delivery?

A. Other than what I have said. We haven't tried to develop trucking because of the disadvantages in our handling of the business at the mills.

Q. Did you attempt to discourage trucking in any other way than you just described?

A. Not to my knowledge.

Trial Examiner Norwood: Well, did you say on your direct that you billed them f.o.b. mill, or destination, with the regular rail rate charged off?

The Witness: Billed them at destination price and allowed them the rail freight.

Trial Examiner Norwood: Full rate charge, full rate price charged?

The Witness: Yes, sir.

By Mr. Wooden:

Q. And then did you permit them to take it anywhere they cared to, or did you require that they take it to the destination where you had figured the price?

A. Well, we had no way of knowing where they took it. We did insist, we specified that the dealer who would send a truck to the mill for a load of cement should fur-

47226 nish the driver with a ticket showing that it was for this particular dealer.

Q. Well, in other words, if you had not taken some measures to see that the cement went to the destination for which you figured it, it would have conflicted with your policy regarding diversions, wouldn't it?

A. Well, I do not think trucking would conflict with our policy regarding diversions of rail freight. They are two separate things.

Q. Yes, but to permit diversions through trucks would have conflicted with your policy of preventing diversion by rail shipments, wouldn't it?

A. Well, it would undoubtedly have caused us trouble with our customers, where trucked in on them, the same as in shipped in by rail.

Q. And I take it then, that you saw to it that the truck shipments had to go to the destination for which the price was figured?

A. No, sir, we did not attempt to police our truck deliveries. That would have been impossible and too expensive. We could not have afforded it.

Q. Well, didn't you require any assurance from the dealer, that it was going to his particular destination?

A. Other than as I said that he would furnish him with a ticket, furnish us with a ticket to his driver, and
47227 of course, we do not know what they did with it after they got it?

Trial Examiner Norwood: Well, did you have any trouble or complaints from any diversions through that trucking?

The Witness: Yes, we did at Davenport, your Honor.

By Mr. Wooden:

Q. When the cement is loaded on the truck in such cases, the truck being supplied by the dealer, do I understand that right?

A. Yes.

Q. Loaded on at the mill, under those conditions, did you consider the cement delivered to the dealer when he got it on his truck, or only after he got it back to his destination?

A. Well, I do not know that I ever gave any consideration to that before.

Q. You have given consideration to the subject of passing of title as shown by your testimony?

A. That is right.

Q. You would not claim that that was your cement after

the dealer sent his truck for it and you loaded it on his truck for him, would you?

A. Well, Mr. Wooden, well, one of our conditions of sale is that the price we quote is the price for a particular destination, and if the cement is used at any other
47228 destination, the purchaser agrees to pay the price at such destination where the cement is used.

Q. But you allowed the dealer, in these cases, the full rail freight, according to your testimony?

A. That is right. We relied on the dealer playing fair with us, although in some cases they did not.

Q. You mean really playing fair, you mean taking it only to the destination?

A. Where he agreed to take it when he bought it.

Q. Now, wasn't there a time at your Dewey mill, where you discontinued trucking?

A. I do not recall any such time. Our records show that we have loaded trucks there right continuously through every year, we were shipping some cement on trucks, and we have all through the period.

Q. Wasn't there a time when the Dewey mill permitted a dealer to come to the mill and get cement, load it on his truck, with no questions asked as to where he was going, or what the destination price was?

A. I do not think so.

47229 Q. Mr. Moore, didn't you have complaints from your dealers at times about your trucking policy at Davenport, and Dewey?

A. Why, I recall a few complaints at Davenport; not so much as to policy, but the trucking in.

Q. Well, didn't you have complaints from dealers regarding your trucking policy at Dewey?

A. I do not recall any.

Q. Didn't you have complaints from dealers to the effect that their competitors were going to your mill and trucking cement away and upsetting the prices in their localities?

A. Why, I do not recall that at Dewey.

Q. You did not have any complaints from dealers associations in Oklahoma or Kansas, or anywhere, that some dealers were trucking cement away from your Dewey mill and disturbing market conditions?

A. Not to my knowledge.

Q. You did have something of that sort at the Davenport—

47230 The Witness: Well, we had some some place from dealers at Davenport, but from no one else that I have any knowledge of.

By Mr. Wooden:

Q. And were those complaints from dealers at Davenport to the effect that other dealers were trucking from your mill and upset market conditions?

A. Trucking in on their market, yes, causing them difficulties.

Q. That was not altogether a question of outside dealers trucking into other dealers' markets; was it?

A. Well, as I recall it, that is the situation, that is what it was.

Q. Well, didn't you have some complaints from
47231 dealers that competitors right in their own home towns were trucking from the mill and disturbing market conditions in the common home town of the dealer?

A. I do not recall any such.

Q. Well, what change, if any, did you make at Davenport to meet the complaints of such dealers?

A. Well, the only change we made was just to tell our dealers that were trucking, that they would have to send a written request with their truckers, that we load certain quantities of cement for them.

Q. Do you mean that they had to give you some assurance that it would go only to the towns for which you have figured the delivered price, and given them an allowance?

A. Well, no. May I have that question again, please?

Trial Examiner Norwood: Read it.

(Question read.)

The Witness: Oh, yes.

By Mr. Wooden:

Q. I understand that—did you do the same thing at Dewey?

A. I am quite sure we did.

Q. And when did you inaugurate that policy at Dewey and at Davenport?

A. I do not know the date.

Q. I understand you to say that trucking was
47232 never discontinued at Dewey or Davenport?

A. Yes, sir, that is what I said. We are still trucking at both plants.

Q. And do I understand that the only change in the

condition under which you permitted it was this matter of requiring some assurance as to where the cement was going?

The Witness: No. I said that we tried to talk our customers into taking rail delivery because of the difficulties that we ran into at the plants in loading trucks on account of our lack of adequate facilities.

That would be in addition to the other reasons, and while it may not be germane in the face of the laws that interfered, we did not have anything to do with this.

47233 Q. Well, as I understand it, you made no changes in your policy for any reason of State laws, or otherwise; is that correct?

A. Well, our policy is still to load trucks, Mr. Wooden.

Q. In other words, what change in your policy did you make because of the State laws that you referred to?

A. I do not know of any change that we made because of that law.

Mr. Wooden: Then, your Honor, I move to strike all this testimony about the State laws that we objected to on direct.

Trial Examiner Norwood: Read that last question and the answer.

(Question and answer read.)

Trial Examiner Norwood: If the counsel will make his motion later and include the lines and pages, I will consider it.

Mr. Wooden: All right. I just want to give notice now.

Trial Examiner Norwood: The lines and pages of the material that he thinks should be struck, and pursuant to this testimony, and I will study it and come to a decision.

47234 Q. I am showing you Commission's Exhibit 976-11-E, which is a part of the questionnaire, of Clark and Burns' questionnaire, submitted by your company.

Mr. Seeley: I object, your Honor. The record shows abundantly yesterday and today, that this document is not—the witness has not identified this document as the answer that was submitted by his company.

I object to Mr. Wooden showing the witness any further papers from this document, unless it is established that this is the answer of this company.

Trial Examiner Norwood: Do you think that he should not attempt to identify what he has there?

Mr. Seeley: If this is the same document which Mr. Wooden was using yesterday, in his examination of the witness, concerning the answer of the Dewey Company and the Burns and Clark questionnaire, I object to any
47235 further examination about this document.

Trial Examiner Norwood: The objection is overruled.

Mr. Wooden: The witness has stated that he could not tell one way or the other, whether these were—

Mr. Seeley: That is not the witness' testimony.

Mr. Wooden: Well, I submit that it is.

Mr. Seeley: We have got the record right here.

Trial Examiner Norwood: I overruled the objection. Go ahead and ask your questions, directed to the witness.

By Mr. Wooden:

Q. Well, I am showing you Commission's Exhibit 976-11-E, which is a portion of the questionnaire answers submitted to Clark and Burns, and calling your attention to Question No. 10B on that page where it says that trucking was discontinued altogether since January 1, 1925.

Mr. Seeley: Could I have an exception to this entire line, your Honor?

Trial Examiner Norwood: Yes.

By Mr. Wooden:

Q. What do you still say, that trucking was never discontinued?

A. I do.

47236 Q. Isn't it a fact that after 1925 and up to 1933, that you had trucking at your mill without any restrictions at all as to where the cement was going?

A. I do not think so.

Q. What do you understand by this statement to which I directed your attention in the questionnaire, that trucking was discontinued altogether?

47237 The Witness: I make the same answer, Mr. Wooden.

By Mr. Wooden:

Q. Do you say that the answers that appear on this sheet, Commission's Exhibit 976-11-E, are not the answers that were made to the Clark and Burns questionnaire?

47238 The Witness: Well, I do not see anything on this document to identify it with the Dewey, Oklahoma plant.

Trial Examiner Norwood: Do you say that those—can you testify that those were not the answers made by your company?

The Witness: I do not know whether they were or not, your Honor.

Trial Examiner Norwood: Then, you cannot testify that they were not?

The Witness: No, I cannot.

Trial Examiner Norwood: That answers it.

By Mr. Wooden:

Q. Did you make any change at your Dewey, Oklahoma, mill regarding trucking on March 31, 1933?

A. I do not know of any change we made on that date.

Q. Did you make any change regarding trucking to meet competition?

47239 The Witness: I do not know of any.

By Mr. Wooden:

Q. Did you make any on March 31, 1933, to meet competition?

A. I do not know of any.

Q. You do not know of any abandonment of your former policy regarding trucking to meet competition?

A. No, sir.

Q. Is this answer to 10-A of Commission's Exhibit 976-11-E, is that in accordance with the policy and practice of your company at Dewey?

(The witness examines paper handed to him by Mr. Wooden.)

Mr. Seeley: May I inquire what the exhibit number of this paper is, so the record will show?

Mr. Wooden: I gave it in my question.

Mr. Seeley: 976-11-E, Commission's Exhibit?

The Witness: Did you say "10-A," Mr. Wooden?

By Mr. Wooden:

Q. Yes.

A. Yes, sir. It is in accordance with our policy.

47240 Q. And it is in accordance with a continuous unchanged policy since 1925?

A. We are still doing it today.

Q. Is it in accordance with an unchanged policy existing ever since 1925?

A. Yes, sir.

Q. Then, you would say that these answers on this ex-

hibit, Commission's Exhibit 976-E-11, do not correctly reflect the policy of the Dewey Company with regard to any change in trucking?

The Witness: Could I have that question again?

Trial Examiner Norwood: Read the question.

(Question read.)

The Witness: Yes, sir, I would say that-

By Mr. Wooden:

Q. In other words, if that is the Dewey Company questionnaire that you reviewed, then the answers are wrong; is that it?

A. Yes, sir. That is my best judgment.

Q. Can you name any dealer who was allowed to truck from your Dewey plant? After March 31, 1933, and who was allowed the full, actual railroad freight from plant to destination?

A. No, sir. I don't have in mind the details.

Q. But you assert that was the general practice, to do that?

47241 A. Yes, sir.

Q. Can you name any dealers who truck from your Davenport mill, after September 9, 1932, and who were allowed the full actual railroad freight from plant to destination?

A. No, I can't have that detail in my mind.

Q. Now, I show you Commission's Exhibit 976-3-I, which is in the record as a part of the questionnaire answers submitted by the Dewey Company to Clark and Burns, and will ask you to state whether or not on September 9, 1932, your policy regarding trucking was changed at Davenport?

The Witness: No. I would say our policy has not changed.

By Mr. Wooden:

Q. You say your policy at Davenport did not change at any time since 1925, regarding trucking in order to meet competition?

47242 The Witness: That is what I say.

By Mr. Wooden:

Q. Did you at any time, at Davenport, make an arbitrary allowance for trucking from the delivered carload price?

A. I think we did.

Q. What was the nature and the amount of that arbitrary allowance?

A. I do not recall the amounts. I think we had differing amounts depending upon the distance that trucking was to be carried on, greatly in excess of the rail rates.

Q. Do you mean that it was an allowance of an addition to the rail rates?

A. An allowance.

Q. In other words, what do you mean by where the trucking was higher than the rail rates.

A. I mean that we allowed a trucking allowance much greater than the rail rate allowance would have been.

Q. In other words, you allowed more than the rail rate?

A. Yes, sir.

Trial Examiner Norwood: When was that?

The Witness: That was shortly after we began operation of the Davenport plant.

47243 Q. And, you can't say what the amount of that allowance was?

A. Well, as I say, it differed according to the zones of destination. It seemed to me like the allowance in one case was fifteen cents a barrel, and in another case it was twenty-five cents a barrel for deliveries further on, and we had three or four zones, I think.

Q. Did you ever charge fifteen cents a barrel, or any other figure, in addition to the mill net that you obtained on rail shipments to the same point?

A. Do you mean for truck?

Q. Yes, for truck.

A. Not that I know of.

Q. And you claim to be fully familiar with the policy and practice of your sales department in all these matters?

A. Yes, sir.

Q. Can you name any dealers who took truck delivery at your Davenport mill since September 9, 1932, and at your Dewey mill, since March 31, 1933?

A. No, Mr. Wooden. That is detail that I cannot keep all in my mind.

Mr. Wooden: I give notice, your Honor, of motion to strike the witness' testimony about the trucking
47244 policy of this company, because it is apparent that he is flying in the face of written reports made by his company to Clark and Burns at a time when there was no motive to make the situation appear any other than it

was, also because the witness is unable to give the names of any parties from which his testimony might be checked, or verified, and he has not yet given any answer to my request for the production of the duplicate report, duplicate questionnaire report that was submitted to Clark and Burns, all of these things being peculiarly within the knowledge and possession of the company or its counsel.

47246 Q. Do you think, Mr. Moore, that you can produce invoices to dealers which substantiate your claim that they were allowed the full freight to destination after these dates that I have given you, applying to your Dewey and Davenport plants, respectively?

A. Yes, sir.

Q. Will you undertake to do so?

Mr. Seeley: I object, your Honor.

Mr. Leisure: That has been answered.

Mr. Seeley: Counsel knows that the question should properly be addressed to counsel.

47247 Mr. Wooden: Well, I address it both to the witness and to counsel.

Trial Examiner Norwood: Proceed.

By Mr. Wooden:

Q. Did your Dewey or Davenport plants put in truck-loading platforms?

A. We did not at Dewey. We had a platform at Davenport that was constructed for the unloading of inbound shipments of returned bags, which we did use, and still use for loading trucks. It was not for that particular purpose, however, that the platform was built.

Q. Showing you Commission's Exhibit 1011, a letter to you from Mr. Reiter, chairman of the Code Authority, April 18, 1934, what was the matter about which you had written Mr. Reiter to which he is there replying?

A. It refers to trucking.

47248 Q. Yes. What have you suggested regarding trucking?

A. I had not suggested anything. I asked him if the Code Authority was in position to give me information on certain provisions of the Code relating to trucking.

Q. Well, Mr. Reiter says here he was much interested in your analysis of the situation.

What was your analysis of the situation?

The Witness: Well, I was trying to present a matter to Mr. Reiter in, as I thought, to develop any and all

possible interpretations of the Code as related to trucking.

I was afraid to ask him one question, but I wanted to try and develop the different angles that might occur under the Code, relating to trucking, and I do not have in mind everything I said.

I think it was about a two-page letter, maybe more than that, and I went into it to try and develop what the position of the Code Authority would be in certain particular cases.

By Mr. Wooden:

47249 Q. Weren't you taking the position that the Code Authority should not receive prices, terms, and conditions covering truck delivery when offered for filing?

A. No.

Q. Will you produce your letter of April 16, 1934, to which Commission's Exhibit No. 1011 is an answer?

A. Well, that will depend upon counsel for action.

Mr. Wooden: Well, I address the request also to counsel as well as to you.

Mr. Leisure: My reply is, Mr. Wooden, we do not have it in the court room.

Mr. Wooden: Well, I do not confine my request to production in the court room. I ask for its production.

By Mr. Wooden:

Q. Now, referring to Commission's Exhibit 1710, a letter of yours to Mr. G. W. Cole, March 28, 1932; that is your letter, isn't it?

A. Yes.

Q. And your signature?

A. Yes.

Q. You were assisting Mr. Cole, were you not, in an effort to get railroads to make lower rates, in order to meet truck competition?

A. No.

47250 Q. What were you doing in connection with Mr. Cole?

A. Well, this letter has reference to—

Q. Well, I know what the letter says, but can't you tell us, out of your own mind, what you were doing to assist Mr. Cole?

A. Well, I, all I did was to give him some information regarding our truck shipments from our Davenport plant.

Q. Didn't you know what Mr. Cole was trying to do?

A. Well, I knew what the conference had been called for between the railroads and the cement shippers, but I did not know what action Mr. Cole was going to take.

Q. You did not know that there was a movement on, headed by Mr. Cole, to get lower railroad rates in order to meet truck competition?

A. Well, I did not know Mr. Cole headed any such movement. I knew that there was a conference called. I had been invited to attend, but I could not go.

Q. Well, you say here in your letter, if you could not be at the Chicago meeting, that you gave Mr. Cole authority to state that your company agreed with his views.

A. That is right.

Q. What does that mean?

A. Well, whatever view he took would be satisfactory to us.

Q. And you did not know what his views were?

A. No.

17251 Q. You did not know what he was trying to do?

A. I did not know what he was expecting to do.

Q. I direct your attention, Mr. Moore, to Respondents' Exhibit 3591, in which a reference is made to the Dewey Company's letter of June 21, 1932.

Do you see that?

A. Yes, I see it.

Q. Now, I am asking you and your counsel if you will produce that letter of the Dewey Company of June 21, 1932, that is referred to in that exhibit?

Mr. Leisure: That, my reply to that, Mr. Wooden, is we do not have it in the court room.

Mr. Wooden: Is that the only reply you make Mr. Leisure, that you do not have it here?

Mr. Leisure: Yes.

Mr. Wooden: You won't say whether you will produce it at all or not?

Mr. Leisure: I will be glad to consider it, Mr. Wooden.

By Mr. Wooden:

Q. Now, you testified, I believe, that at the Davenport mill, it has always been the practice of the Dewey Company to allow its customers to deduct the full rail freight to destination, even though it was shipped by water; is that right?

47252 A. Yes, I testified to that on water shipments.

Q. Do you think you could produce invoices that would show, or other documents that would show that to be the fact?

A. Yes, sir.

Q. Will you undertake to produce such invoices during the year of 1936, and up to July, 1937?

A. I will have to be guided by advice of counsel.

Mr. Wooden: Well, I make the request both of you and of counsel.

Mr. Leisure: My reply to you, Mr. Wooden, is that I do not have them in the court room.

By Mr. Wooden:

Q. Can you give the names of any customers who took water delivery at Davenport, and were allowed the deduction of the full rail freight to destination?

A. Central Engineering Company is one.

Q. Where is it located?

A. Davenport.

Q. Do you know what destination was involved?

A. No, they had deliveries at several destinations.

Q. Will you say when such shipments took place?

A. No, I did not say when.

Q. Can you?

A. No, sir.

47253 Q. Not even the year?

A. No, I would not want to say the year. I do not have that detail in mind.

Q. Can you name the transportation agencies on which such shipments were made?

A. Private carriers.

Q. Well, can you name any of them?

A. No, they made their own arrangements with the towing companies, furnished their own barges.

Q. And I believe you said on direct that the Government Transportation Barge Agency was not used?

A. Well, that is my understanding.

Q. Isn't it a fact that on some of your water deliveries, that the rail freight, the rail route is by a very indirect way, involving much longer distances than by water?

A. No, sir. That is not so. The main line of the Burlington Railroad parallels the Mississippi River from St. Louis to St. Paul, and the line of the Milwaukee Railroad is on the opposite side of the river, and I would say that

any water delivery would be not far from a rail delivered point.

Q. But I am speaking of the route that your rail shipments would follow, whether they have to go over several roads in order to get to the river destination?

A. No, sir. The C. B. and Q. Railroad gets into
47254 our plants direct from Davenport under reciprocal switching arrangement with the Milwaukee and Rock Island Railroads, so it would be only one railroad involved.

Q. But there are other destinations where that is not true; aren't there?

A. Not along the Mississippi River.

Q. You had a shipment, what was it, Cave-in-Rock, or dealer at Cave-In-Rock on the Ohio River?

A. We did not ship that from Davenport.

Q. Yes. I know, but you had business there?

A. Yes, we—

Q. Did you allow the full rail freight in that case, or what did you do?

Mr. Seeley: I object, Your Honor. The record that Mr. Wooden is referring to, Commission's Exhibit 3093, I believe it was, the record shows amply that those shipments were made,—

Trial Examiner Norwood: Wait a minute. Read the question first.

(Question read.)

Trial Examiner Norwood: Now, don't tell what the—don't tell the witness what the record shows, please.

Mr. Seeley: Well, first, I want to inquire—I want you to direct Mr. Wooden to put the direct question to this
47255 witness as to whether he did make any shipments to that point.

Trial Examiner Norwood: The objection is overruled.

Mr. Wooden: We know he did not ship it. We all know he bought it from another company.

Trial Examiner Norwood: Answer the question.

The Witness: If I understand what he wants to know, it is that we allowed him the rail freight from St. Louis or Prospect Hill mill to Cave-in-Rock, that was the point to which the cement was shipped.

By Mr. Wooden:

Q. And you did make that allowance?

A. Yes.

Q. Now, in other cases, do you allow the full rate

from, freight from Davenport or from some other mill when you make shipment to river points?

A. If we ship it from Davenport, we allow the full rail freight from Davenport.

Q. Do I understand you to say that your clerks in your traffic department check the railroad tariffs from all of your competitors' mills?

A. All those that are competing in our territory, yes.

Q. Isn't it true that there are different rates between the same points over different rail routes?

A. Not generally.

47256 Q. Isn't it true that there are differences depending on the routing?

A. Well, I cannot think of any case of that kind.

Q. You do not know, as a traffic expert, that rates between different points, between the same points differ depending on the route that is followed, you do not know that that occurs in many instances?

A. You are confining yourself to rates on cement, I take it?

Q. Well, yes. I do not think I want to be any broader than that.

A. Well, I know this, that of course there are routes in the tariff, or routes between two points that are not the routes open to the movement of traffic, where you could not apply the rate in the tariff over such a route, but, generally, and I do not know of any exceptions, how the rate between origin and destination over all available routes in the tariff is the same.

Now, that might be a dozen routes, but it might be only one route, if it is a one-line haul involved.

Q. It is your testimony, in so far as the Dewey mills are concerned, that there is no difference between the rates by different routes from those two mills to given destinations?

A. No, I did not testify to that.

47257 Q. Well, I am trying to get it clear, what you mean.

A. Well, I will go over it again.

Q. Why can't you answer it?

A. I cannot answer it that way.

Q. All right. Then, do you testify that in some cases the rates from your two mills to given destinations are different, depending on the route?

A. I do not testify that way, no, sir.

Q. All right. Tell us just what you do testify to.

A. Well, if you confine yourself to the routes in the tariff, I say that the rate is the same via all routes in the tariff, but if you want to bring in some routes that are not in the tariff, then the rate would not be the same over those routes.

Q. It could still be shipped over those routes, though?

A. Well, it would never be used. Who would want to use a route where you have to use a combination of local rates three or four times the rate that you could have available over published routes?

Q. Well, at any rate, I gather, you agree that the rates may be different depending on the route?

A. Well, I have already said what I agreed.

Q. Don't you consider the matter of routing of shipments an important matter?

A. Sure.

47258 Q. Is it important from a delivered price standpoint, or from a shipping traffic standpoint?

A. It certainly is important from a traffic standpoint.

Q. What is your understanding, as a rate expert, of the duty of the railroad with regard to giving a consignee a benefit of the lowest rate by the lowest route to his destination when there is nothing specified as to rate or route on the bill of lading?

The Witness: Well, I do not believe that question is susceptible to an answer in its present form, because you say "lowest route." I do not know what you mean by lowest route.

By Mr. Wooden:

Q. Well, the lowest route, the lowest rate over any route, then.

A. Well, could I have the question with that correction, please?

47259 Trial Examiner Norwood: Read the question, with the correction.

(The question referred to was read by the reporter, as follows:

"Q. What is your understanding, as a rate expert, of the duty of the railroad with regard to giving a consignee a benefit of the lowest rate over any route to his destination when there is nothing specified as to rate or route on the bill of lading?")

The Witness: Well, I understand it is the duty of the carrier to whom the shipment is tendered for movement to move such a shipment over the route via which the lowest rate applicable via the line of that carrier, either direct or in conjunction with other carriers.

By Mr. Wooden:

Q. So that would be the duty of the carrier regardless of any specification by either shipper or consignee as to rate or route?

A. In that case, yes.

47260 Q. Now, when you checked your freight rate compilations with the Cement Institute freight book, did you find differences?

A. Occasionally.

Q. What did you do in the event you found differences?

A. Settled the difference by referring to the tariff for the correct rate.

Q. Did you call attention of the differences to the Institute?

47261 A. No, sir.

Q. Do you mean to say that if you found a lower rate than the Institute, that you used it to make a lower delivered price there than mills that might be using the Institute book would make?

The Witness: Yes, that has been the occasional case in times past. I do not know that, I cannot recall any particular situation right now, but I know that we have discovered that we had lower rates in our rate compilations than the Institute published in their rate books, and on referring to the tariff, found our rates were correct, and did nothing further about it.

By Mr. Wooden:

47262 Q. Well, do you mean to say that on finding your lower rates were correct, that you reduced the delivered prices at those destinations immediately without saying anything to The Institute about it?

A. I did not say that.

Q. I am asking you now.

A. No, sir. The Institute had nothing to do with our delivered prices. As I said, our prices at destination were the lowest price published that we could find in effect at the particular time at that destination.

Q. I am asking you, if you called the Institute's attention to the discrepancy in freight rates not prices.

A. No, sir. We did not.

Q. Do you recall any instance where you found that your rates were higher than the Institute's rates?

A. Well, I am quite sure there were a few such cases.

Q. And what did you do in those cases?

A. Settled the difference in the same way, by referring to the tariff.

Q. And after you found that the tariff showed a higher freight rate than the Institute's book, did you use that rate in quoting prices?

47263 The Witness: Well, the procedure was the same there as where the rate was lower, but no immediate effect upon the price we charged at destination unless some other company made a change in the price at destination.

If the price was increased at destination, why, of course, we tried to get all we could for our product, we would increase our price the same way, but I cannot think that there were very many of those cases, if any.

By Mr. Wooden:

Q. Did you check the Institute's books with the freight rates from mills other than your own?

A. No.

Q. No?

A. No.

Q. Well, you were not using the freight rates from your own mills for figuring delivered prices at all except during that period you had one in at Dewey?

A. That is right.

Q. Now, referring to Respondents' Exhibit 3596-B, your letter of June 6, 1932, where you informed the Sec-
47264 retary of the Institute you did not desire any freight rate service continued, when, in fact, did you resume your subscription to the freight rate service?

A. We never resumed it after that date that I can recall.

Q. You did not get the Institute service under the N. R. A. Code, or thereafter, at all?

A. Not after the date of that letter that I can recall, Mr. Wooden. We sent all of our books back.

Q. Then you haven't checked, as I understand it, the Institute books, freight rate books, with your own freight rate compilation, since 1932?

A. That is right. That is the way I remember it.

Q. Do you say that no one in your company, in the sales

department or elsewhere, has had the Cement Institute's freight rate books since 1932?

A. Not to my knowledge, they have not.

Q. And you would know if they had?

A. I think I would.

Q. The sales department has not had them?

A. I do not think so.

Q. Well, weren't you entitled to the freight rate service as a part of your membership in the Cement Institute?

A. Well, there was a time, I do not recall the date, when we were entitled to that, but they served notice on
47265 us that they would have to charge us for the freight rate information, and when that came about, we told them we did not want their books, we did not need them. We took them because they were free beforehand. They were not worth anything to us to pay anything for them.

Q. Do I understand that since 1932 you had figured delivered prices at destinations where you did not have specific information, by adding freight from the basing point to such destinations?

The Witness: Yes, that has been done.

By Mr. Wooden:

Q. And, where did you get the information as to the rates from such basing points?

A. From the freight tariffs.

Q. What did the company do for a conversion table, from hundred pound freight rates into barrel rates, prior to 1912, when I understand you prepared such table?

A. I do not think they had such a thing of its own then.

Q. Well, the conversion table from one hundred pound rates into barrels, is of no use or value for traffic or shipping purposes; is it?

47266 A. Well, I cannot think of any use you would make of it for traffic purposes.

Q. In other words, it is converted into barrels from hundred pounds for pricing purposes; isn't it?

A. Well, that, and to determine the mill net on the price that we might sell our commodities for.

Q. You can use the conversion table to determine mill nets by deducting the barrel freight from your mill to the destination, that is correct, isn't it?

A. Yes.

47267 Q. I am talking about the Dewey's conversion tables that are in the record as Respondents' Exhibits 3597, 3598 and 3599.

Do you understand now?

Mr. Seeley: I withdraw my motion.

By Mr. Wooden:

Q. Well, how does it happen, Mr. Moore, that these exhibits I just mentioned are headed "Schedule for figuring prices, delivered prices," if the figuring of mill nets is their purpose?

47268 The Witness: It can be used for both purposes, figuring mill nets or figuring delivered prices.

By Mr. Wooden:

Q. They could be used for figuring mill nets only, exactly, only in the event that they are the actual freight rates per barrel that are shown on these exhibits; isn't that correct?

A. Well, yes, whatever rates are there, are enough for our purposes, desire to know what our mill nets are. It don't have to be down to a fraction of a cent.

Q. As a matter of fact, this column in these three exhibits that is headed, "Actual freight per barrel," is not the exact amount of the actual freight, in all cases; is it?

A. No, that is the actual freight that we used which has been treated by our method of disposing of fractions as I testified on direct.

47269 Q. It is not the actual freight that the railroad company receives; is it, in all cases?

A. Oh, no. I say it is not.

Q. Does the railroad rule regarding disposition of fractions apply only on less than carload shipments?

A. No.

Q. It applies on carloads, as well?

A. Yes, it applies on carloads.

Q. In deciding its rate of operation of its mills, did the Dewey Company take into account, the stocks on hand at other mills as well as stocks on hand at its own mills?

A. No, sir.

Q. You would not consider that of any importance at all in determining your rate of operations, what the stocks on hand were at other mills?

A. No, sir.

Q. You did have that information, though, didn't you, as to what stocks were on hand at other mills?

A. Well, I do not recall whether we did or did not. We had information for the district, I know that, from—

Q. Well, didn't you get it from Mr. Mallory?

A. We may have. I do not recall.

Q. In other words, you want to be understood as saying that this was of no importance to you to know what the stocks on hand at other mills are in determining your rate of operations?

47270 A. It is of no importance to us, no, sir.

Q. Well, is it your testimony that the Mallory statistics as to production of shipments and stocks on hand are of no importance to the Dewey Company?

A. Well, I do not think there is very much, if any, importance to it.

Q. During the time that you were subscribing for the Mallory statistics, before you got them through The Cement Institute, didn't you know Mallory had other cement manufacturers providing the same information that you were providing?

A. Well, when we subscribed to his service, why,
47271 we knew what we were going to get for our money we paid for the subscription.

Q. You knew you were going to get the same thing that you furnished, only you were getting from the remainder of his subscribers?

A. Well, in some sort of form. I do not remember the form the information was to come in, whether it was consolidated or what.

Trial Examiner Norwood: Did you know you were getting the same sort of thing that your competitors were getting?

The Witness: Well, I can't say as to that, your Honor.

By Mr. Wooden:

Q. Do you mean to say you can't say that you were providing Mr. Mallory with information without knowing whether you were getting the same kind of information through him from your competitors?

A. No, I do not know.

Q. Did the Dewey Company ever get the Mallory figures on the rated capacity of the Dewey mills?

A. I do not know as to that.

Q. Well, I understand you expected to get the statistical data like that, that you got from Mr. Mallory when you joined the Institute in 1931; that is correct, isn't it?

47272 A. Well, we understood that there would be certain statistical data issued by the Institute. I do not know that we understood identically the same type or not.

Q. Well, you testified on direct that that is what you expected, didn't you?

Mr. Seeley: I object, your Honor. That is misstating the record.

Trial Examiner Norwood: Overruled.

The Witness: I do not recall that I testified the same way on direct, or that I did not.

By Mr. Wooden:

Q. Well, didn't, as a matter of fact, you continue to receive these statistical reports from Mr. Mallory direct from him for some time after you joined the Institute?

A. Well, I do not know when the change came about, I know we were getting statistics from Mr. Mallory, and then there came a time when we began to get similar statistics from the Cement Institute, and I do not know when the change took place.

Q. You were not very sure, were you, as to the time that you resigned from The Institute?

A. Well, I gave my best recollection.

Q. And that was what?

A. Well, it was about, as I recall, it was 1931, along there, some place, 1930 or '31.

47273 Q. Did you say December of 1930 or '31, or what is your best opinion about that?

A. Well, I think I said it was in December, effective January 31.

Q. Of what year?

A. The following year.

Q. But you are not quite sure about the year?

A. I think it was in 1931, effective in 1932, that is the way I recall it now.

Q. Can you say whether you had resigned prior to this letter of June 6, 1932, Respondents' Exhibit 3596-B?

A. Yes. I think we had, and I think that is the reason they wanted to charge us extra for the freight rate service because we were not members of the Institute.

47277 PROFESSOR RAY BERT WESTERFIELD was
47278 thereupon recalled as a witness for the Respondents and, having been previously duly sworn, testified as follows:

Mr. Withrow: Professor Westerfield has been sworn.
Trial Examiner Norwood: Go ahead.

Direct Examination by Mr. Withrow.

47281 Q. Professor Westerfield, do you have in mind now, Mr. MacIntyre's statement or question, and then the Trial Examiner—I was just going to read to you what you said, and then I will hand you the record so you can refresh your recollection.

A. I would much prefer that you would read it to get it definitely in my mind.

Q. All right. I will start again.

By Mr. MacIntyre, Line 16, the question is:

"Whether he as an economist, could consider that they were acting independently in carrying them out, after having met, discussed the policies and practices, and arrived at an understanding that they all should do it, and then simultaneously did it," and your answer:

"Yes, this time he left out the word concertedly; and I might say that they might have done that even then, individually. Apparently there was no binding obli-
47282 gation, any agreement to do it, and so thereafter each one might still have exercised the discretion whether he would do so."

Now, Professor, I am handing you the record, and I would like to ask you if the answer which you gave is the answer which you intended to make to the question as set forth by Mr. MacIntyre in the record at Line 16, in the record.

(Handing copy of transcript to the witness.)

A. Is it permissible to read back, Your Honor?

Trial Examiner Norwood: Go ahead.

(The witness examines the transcript.)

47283 Mr. Withrow: Page 45733.

The Witness: My understanding was that this expression "arrived at an understanding that they all should do it," meant that they agreed among themselves.

that it would be a good thing for the industry and for themselves if that practice or policy were adopted, and some other practice or policy dropped, but there was no obligation or binding contract in any sense among them, simply an understanding that it was desirable to make the change, and then it says, "they simultaneously did it."

Mr. Examiner then said, "Well, you can answer that question," and I said, "Yes. This time he has left out the word 'concertedly' which had been bothering me at the close of this, and I can say that they might have done that even then, individually, apparently there was no binding obligation, any agreement to do it, and so thereafter each one might still have exercised his discretion whether he would do so or not."

That is my understanding of the question and the way I answered it.

47295 RAYMOND W. MOORE resumed the stand and testified further as follows:

Cross-examination (Continued) by Mr. Wooden.

Q. Mr. Moore, you were testifying to the effect that you sold at delivered prices because you wanted to get all you could for your product, and that your highest mill net was at your mills; that is, for local sales, and selling at delivered prices required you to take less mill net the farther away you went from your mill, didn't it?

A. Yes, sir.

Q. Do you figure that your average mill net is better if you sell at delivered prices than if you sold f.o.b.

47296 mill?

A. Yes, sir.

Q. Now, you have said that you endeavor to meet competition at destination in selling at delivered prices. Do you mean by that that you tried to make your price no higher and no lower than your competitors at destination?

A. No higher.

Q. Does it mean that you tried to make it no lower?

A. Not necessarily.

Q. Does it mean that you do try to make it lower?

A. That is if it is necessary.

Q. As a matter of fact, you find, do you not, in the majority of sales to dealers, that when you quote delivered prices, that you are not making any lowered delivered price than your competitors?

47297 The Witness: Well, it could happen that at destination there would be three or four competitors quoting, one of which might be quoting a lower price or offering to make a lower price than the others, and naturally we would try to meet the lowest price being made.

By Mr. Wooden:

Q. You find that, do you not, in most cases when you quote dealers delivered prices, that you were making your delivered prices the same as your competitors to those dealers; don't you?

A. Quite often it is not true. There are—

Q. Isn't it true in the majority of cases?

A. Well, I could not say as to the majority.

Q. Or what percentage?

A. Whether it was or not.

Q. Or what percentage?

A. Or what percentage, no, I could not say.

Q. It is true in many cases, isn't it?

A. Yes.

Q. Isn't it a fact that some of your dealer customers do not return their freight bills for credit?

A. Yes.

Q. What do you do in cases where they do not
47298 return them for credit?

A. We ask them to return them.

Q. And in case they still do not return them, what do you do?

A. Well, quite often we write the railroad agent, at destination, to furnish us with a copy of the freight bill to show that the customer did pay the freight, as it was our concept that we were responsible for the freight charges on such shipments, we wanted to be sure that we are not going to be called on to later, to pay the charges, if the customer had not paid them.

Q. Well, don't you know that the customer could not get delivery from the railroad without paying the freight or making some credit arrangement with them?

A. No; but he can.

Q. What?

A. He can.

Q. Are you speaking of all the time since you have been with the company that that is true?

A. There are cases where they could, yes, sir, all the time.

Q. They are the exceptional cases, aren't they?

A. They are not the rule.

Trial Examiner Norwood: But it would have to be on your order, wouldn't it?

47299 The Witness: No, sir.

By Mr. Wooden:

Q. Well, there have been cases, have there not, when the customer did not tender the receipted freight bill, and where you did not write to the railroad company to ascertain if the freight had been paid?

A. I do not recall of any such cases, because we have it a rule that we will write and do write the agent for that document, or copy of the document.

Q. When a customer does not send in the receipted freight bill, do you send him a bill for the freight?

A. Well, he was already billed for the freight in the price, gross price.

Q. You do not send him a separate bill for the freight?

A. No, sir.

Q. Did the Dewey Company have in its quotation forms or any other of its documents, sent to the trade, a clause stating that the Dewey Company was not responsible for loss or damage in transit?

A. As applied to shipments in paper sacks, yes.

Q. Did you ever have it for all shipments regardless of whether they were in paper sacks or not?

A. Not that I recall.

Q. Why did you have such a clause with regard to paper sacks and not with regard to other forms of package?

47300 A. Because cement in paper sacks is more susceptible of loss from breakage of handling by the customer and in unloading, and we have that clause in there to discourage the, to encourage the dealers to be more careful, and to discourage the filing of claims against us, or loss to—loss due to breakage of the bags.

Q. Well, the breakage might occur in transit and not after the dealer had received the shipments, you are holding him responsible for the carrier's acts, or what happened before he received the shipment?

Q. What is your answer, Mr. Moore?

A. No; we do not hold our customers responsible in such cases.

Q. Well, your clause read, did it not, "Shipments in paper sacks are at buyer's risk of breakage and
47301 resultant loss of cement."

A. It did.

Q. Do I understand that that clause is continued to be used?

A. Yes, sir.

Q. And can you state when it was first adopted?

A. Not definitely. Shortly after we began to use the paper bags.

Q. Well, can't you approximately time them?

A. No.

Q. That is, the year?

A. Beg pardon?

Q Can you approximate the year?

A. No, I cannot.

Q. Whether it was as long ago as 1930?

A. I think longer than that.

Q. As long ago as 1925?

A. I would not say as to that.

Q. Do you think probably somewhere between 1925 and 1930; isn't that it?

A. Well, it was before 1930, then, I am pretty sure; as to the time before, I am not sure. Paper bags did not come into use until long after I went with the company. I just do not remember the date they did come into use.

Q. Do you know whether or not your competi-
47302 tors, any of your competitors, had a similar provision in their quotation forms?

A. I do not know.

Q. You never saw a competitor's quotation form with such a provision in it?

A. Not that I recall.

47303 Q. Well, do you mean to say that you put that clause in your quotation forms, holding your customers responsible for loss in shipments in paper bags, without knowing whether your competitors were imposing a similar requirement in their quotations?

A. I do.

Q. Now, to what extent have you held to that clause in your quotation forms, in actual practice?

A. We have never held any customer to that clause, so far as I know.

Q. Do you mean to say then that that clause in your quotation form has been a complete nullity, so far as your practice is concerned?

47304 The Witness: Well, so far as charging such losses to the customer is concerned, yes.

By Mr. Wooden:

Q. What do you have it in there for, if you do not intend to hold to it?

A. As I told you, it was to discourage the filing of claims for breakage that could not be supported, and to encourage the careful handling of shipments in paper.

Q. Is it your testimony then, that wherever a 47305 customer has put in a claim for loss in paper bags during shipment that you have allowed it?

The Witness: I do not recall having disallowed a single claim of a customer for loss in shipment in paper bags.

By Mr. Wooden:

Q. And you recall that every one that was made was allowed; is that right?

A. Yes, sir. Every one that I recall was allowed.

Q. And can you say how many there have been in the course of any particular period of time?

A. No, I cannot, because claims are allowed for not only breakage, but for damage in transit due to water, coming in contact with water. We do not separate our claims into classes from breakage and other damage.

Q. When a customer puts in a claim for damage 47306 of any kind, occurring in transit, do you look it over to see whether it is a meritorious claim, so far as collectibility from the railroad is concerned?

A. Well, we look at the freight bill to see if there is a notation of the damage on that. We try to get necessary documents that will support a claim that we file against the railroad.

Q. What do you do in the event that there does not appear to be sufficient ground for collecting against the railroad?

A. Ask the customer to furnish an affidavit that he sustained the loss and use that to support our claim against the railroad.

Q. And after all those efforts do not provide sufficient to sustain a claim against the railroad, what do you do?

A. Well, we credit the customer's account when we file the claim against the railroad, and if we do not collect the claim, it is just our hard luck.

47310 Q. Now, you spoke of the advantages of river transportation as a factor in locating your mill in Davenport.

What advantages of river transportation did you have in mind?

A. Transportation in commodities, coal, gypsum.

Q. Not as a factor in transporting cement?

A. In addition to cement, yes.

Q. Well, what was the nature of the transportation advantage, as far as cement was concerned?

A. Well, we had under consideration at various times since that plant was built, the matter of building silos at Minneapolis, or St. Paul, Minnesota, or at Alton, Illinois, to which we might transport cement in bulk, and distribute from those silos.

Q. You never did that?

A. Not yet. We have it still under consideration.

Q. Did you have that in mind as a factor in deciding to locate at Davenport?

A. Yes, sir, certainly did.

Q. What advantage would that have been to have silos at river points?

A. We felt that we could, might be able to trans-

47311 port cement by barge from our plant to a silo at one of those points at a less transportation cost than if we attempted to move the cement by rail.

Q. And, as an expert rate man, you considered that was feasible?

A. It certainly is.

Q. What do you mean by saying "it certainly is"?

A. Well, we have had experience for four years now in transporting coal by barge from Alton, Illinois, and East St. Louis, Illinois, to our plant at Davenport, and we have got some idea as to what the transportation costs by water are.

Trial Examiner Norwood: Does it cost less than rail, you say?

The Witness: Yes, sir.

By Mr. Wooden:

Q. And the same thing would apply to cement?

A. We have not transported any cement by barge, ourselves, but I am sure that our experience from transporting coal proved that we can transport cement by barge for less money.

Q. Less money than rail?

A. Than all rail.

Q. And as I understand it, you built your mill at Davenport with that thing as one of the elements?

A. Yes, sir.

47312 Q. And your decision?

A. Yes, sir.

Q. To locate there?

A. Yes, sir.

Q. And deciding to build at Davenport, you also considered, did you not, what the freight rates by rail were out of Davenport?

A. Well, we considered the general adjustment of freight rates in that territory with the conviction that we could obtain as good basis of rates from Davenport as applied from competing mills, or mills that would be competing in that territory. No rates had been established yet on cement from Davenport when we decided to go ahead and build.

Q. Well, there naturally would not be until a mill was built there, would there?

A. Well, there are rates on cement from points where there are no mills located.

Q. Well, a silo, or something of that sort?

A. Well, a silo.

Q. It is a shipping point, at any rate?

A. Yes, sure, it has to be a shipping point.

Q. Well, in locating at Davenport, you figured what the rail rates were from Davenport and what they were from points where other mills were located, didn't you?

A. We worked that out later, after we began construction.

47313 Q. Well, I do not need the exact details, but you knew in a general way how the freight rates out of Davenport compared with freight rates from other mills?

A. Well, there were no cement rates out of Davenport

at the time, Mr. Wooden. We knew what the general adjustment of freight rates on cement in the territory was.

Q. You knew what you could count on, approximately?

A. Well, we did not get all we thought we were entitled to when we finally got our adjustment up there.

For example, we thought we would get rates into Illinois on the basis of the Davenport mileage, but when the carriers came to check in our rates, they checked them in on the basis of their mileage from our plant at Linwood, while going west, they used the Davenport mileage.

We did not get as good adjustment as we thought we were entitled to, and we later tried to remedy that by cases before the I. C. C.

Q. But you did not build a mill without studying the relation of freight rates from other mills with what you expected to be the freight rates from your mill?

A. No, I said that we—the adjustment, general adjustment had already been prescribed in that territory by the Interstate Commerce Commission, but there were a number of exceptions to that adjustment applying from some of the mills, and we did not get the same exceptions in 47,314 adjustments from Davenport.

Q. You knew when you built at Davenport, didn't you, that certain mills in that section were basing point mills, and that certain others were not?

A. Yes.

Q. And you decided that Davenport would not be a basing point?

A. Yes.

Q. Now, referring to this matter of prepay freight on return cloth bags. Can you fix a time when that was changed so that returned bags were shipped freight collect to the mills?

A. I do not know how close I can come to it. I would say around about 1935, as I recall it.

Q. In other words, up to that time the consignees, or your customers, had to prepay the freight when they returned cloth bags?

A. That is right.

Q. And that change by which they were permitted to ship the bags collect to the mill came about through railroad change in Classification Rule; is that right?

A. Yes.

Q. Did you take any part in bringing about the change in the classification by the railroads in that matter?

A. No, sir.

47315 Q. Do you know in whose—do you know at whose instance the change was made?

A. No, sir.

Q. Did you consider it an advantage or disadvantage to the Dewey Company in having that change made?

A. A distinct disadvantage.

Q. In other words, you, the advantage to the Dewey Company, was in having the dealers prepay the freight rather than ship it collect?

A. Yes, sir.

Q. And did that arise out of the fact that that required you to pay out considerably more money sooner than you would—sooner than you otherwise would?

A. Well, we would not have otherwise had to pay it at all.

Q. I see. All right. I believe you said there were some fourteen thousand dollars involved in 1921, is that right?

A. Yes, sir, and twenty thousand dollars in 1922, I believe.

Q. How is it—can you give any later figures for later years, that practice continued up to 1935, I understand.

A. No, I have not any figures in mind for the later years, I believe I testified, however, that the shipment of cement in cloth bags had declined during the years owing to greater shipments in paper bags than in bulk.

47316 Q. Now, showing you Respondents' Exhibit 3619-D, being a circular to your Dewey dealers, January 30, 1922, in that circular you made the statement, "There has been so much complaint about the variations in the cost of returning empty bags, due to differing bases of freight rates to the various mills and also to the application of special jobbers rates from and to some point, that we have decided to reimburse the purchaser of Dewey cement, the entire cost of returning empty bags to our plant at Dewey, Oklahoma."

Who were the complainants from whom so much complaint had been made about the variations in the cost of returning empty bags to the different mills?

A. Our customers.

Q. Dealers?

A. Dealers and contractors, both.

Q. Well, what was the foundation for such complaint, what difference did that make?

A. Well, they did not like the idea of paying more to return bags to Dewey than they would have to pay to return bags to a Kansas mill.

Q. Some of your dealers paid less to return to Dewey than to return to other mills, didn't they?

A. No. Our rates were all full Fourth Class rates.

Q. But didn't you have nearby dealers whose cost of returning bags to you was less than those of dealers
47317 at a distance?

A. No, sir, because—if you want the reason, I can give it.

Q. Yes, go ahead.

A. Independence, Kansas, a mill is located just about twenty miles from the Oklahoma line, and it would be the nearest mill to the Kansas destinations that were affected by this situation, therefore, the bags could be returned to Independence, in many cases, for half the freight cost that it would take to return the bags to Dewey.

Q. Well, that meant, didn't it, that the dealer who bought cement from the Independence mill and returned the bags, really got his cement for less than if he bought from Dewey?

A. That is just exactly what it meant.

Q. But after this change was made by which the bags were shipped collect to the mills, the mills absorbed that?

A. Yes, sir.

Q. Well, these complaints that you had from dealers, and which are referred to in the Exhibit, Respondents' Exhibit 3619-B involves also that feature, didn't it, that some dealers were getting cement from some mills at less than they could from other mills?

A. Well, it was costing them less to return the bags to some mills than it was to Dewey.

Q. That made their net cost less?

47318 A. Well, it would make their net handling charges less. I do not look at it as affecting the cost of cement so much.

Q. Now, you testified on direct that Dewey had been making high early strength cement for ten years.

Do you fix that period by the time that the specifications for high early strength were promulgated?

A. No, not exactly. We had been experimenting and trying to make high early strength cement for some little time before we went into production.

Q. Did you make high early strength cement before high early strength specifications were inaugurated?

A. I think we did, not commercially, however, I do not believe.

Q. You did not sell any?

A. Not to any great extent, at any rate.

Q. Didn't you sell some high early strength cement before the specifications, sell it as standard cement?

Mr. Seeley: I object, Your Honor, unless we know, the record shows what specifications Mr. Wooden is talking to.

By Mr. Wooden:

Q. A. S. T. M. specifications on high early strength cement.

Trial Examiner Norwood: The objection is overruled.

47319 The Witness: Well, as close as I can come to fixing that is some time about ten years ago we began making high early strength cement.

By Mr. Wooden:

Q. Weren't the A. S. T. M. specifications for high early strength cement inaugurated in 1930?

A. They may have been, I do not know.

Q. Well, I would like to find out whether before the A. S. T. M. specifications on high early strength cement, the Dewey Company was making any high early strength cement and selling it as standard cement?

A. Well, we never did that, that I know of. We never sold any high early strength cement as standard cement.

Q. Or sell it at the price of standard cement?

A. No. We have always gotten a differential for high early strength cement, so far as I know.

Q. How much above the A. S. T. M. specifications on standard cement is Dewey cement figured on the basis of tensile strength?

A. I do not know.

Q. Is it substantially above?

A. I do not know that.

Q. Well, didn't you say that it was above the A. S. T. M. specifications?

A. Yes, sir.

47320 Q. But you have no idea how much above?

A. No.

Q. And you do not know how the tensile strength tests on Dewey cement compare with any competitors?

A. Well, I know that it is generally as good at least as that of competitors.

Q. Well, have you seen results of tests?

A. Yes, sir, I have seen the results of tests and seen reports of the use of different cements, and especially from our laboratory reports where the other cements were tested.

Q. Based on those tests, would you contend that Dewey cement is better than some competitor's standard cement?

A. We would not contend that openly to the trade. In our own minds, we are satisfied that it is at least as good as any competitor's cement.

Q. I take it that you have not advertised to the trade that Dewey standard cement is better than competitor's?

A. No.

Trial Examiner Norwood: Why couldn't you tell them it is better?

The Witness: Well, you are liable to lay yourself open to a lawsuit, for one thing. I think you would run into a competitive situation that others would probably say you did not know what you are talking about and

47321 in the wind-up, you would probably get hurt worse than you would be helped.

By Mr. Wooden:

Q. But don't these laboratory tests prove anything?

A. They do to us, but not the public as a whole.

Q. Do they mean anything to contractors?

A. I do not think so.

Q. Engineers?

A. Not so long as the cement meets the specifications. I do not think that the fact that it may be two points above means anything to them.

Q. You mean an engineer is not concerned in getting the best quality cement he can, or the cement that runs the highest above the minimum specifications that he can?

A. No, I do not think a good many of them, if any, I have never experienced any that are concerned in that so long as they get a product that meets the specifications here, that seems to be what they want.

Q. And do you say the same thing in your opinion, is true of architects as well as engineers?

A. Well, I do not know so much about architects. I have not been in contact with any that I can recall now. I know some architects specify our cement in the specifications, but I do not know the reason for specifying it.

Q. Was there ever any time when Dewey adver-
47322 tised to the trade that its standard cement was better than A. S. T. M. minimum specifications?

A. Not that I know of.

Q. You testified on direct that you met the specifications of customers in the early days wherever customers requested it.

I take it, in view of your last testimony, that there were very few customers that requested anything other than the minimum A. S. T. M. specifications; is that correct?

A. That is correct, in the early days.

Q. How has it been in recent years?

A. Well, we have had a lot of special specifications in recent years, mostly coming about through the Government specifications, special Government specifications.

Q. Haven't you had an increasing call for special specifications from engineers and contractors?

A. No, not that I know of.

47324 Q. Well, you testified on direct, that you got less for Government special cements. Did you mean that your mill net was less on those or that you made less because of extra costs?

A. Both.

Q. You say you got less on Government special cements—less mill net—than you were getting on commercial business for standard cement?

A. Yes.

47325 Q. Commercial business at the same destination?

A. Yes.

Q. As a matter of fact, didn't you sometimes net more at the mill in terms of mill net price on Government purchases than you did on commercial purchases at the same destination?

A. No, sir.

Q. What was that induced by—what was it that induced you to take a smaller mill net on Government purchases than you were getting on commercial purchases at the same destination?

A. We had to in order to get the business.

Q. When you sold or quoted the Government on standard cement, didn't you figure out your quotation by relating it to the commercial destination price?

A. Not always.

Q. In most cases?

A. No.

Q. In many cases?

A. In some cases.

Q. Wasn't it your practice, where you knew the destination, to take the commercial delivered price there and figure back from it in order to know what you were going to quote the Government?

47326 The Witness: Well, the general practice was to start out and try to get the destination price.

By Mr. Wooden:

Q. The commercial destination price?

A. The commercial destination price, but the time we got through, the Government generally was able to induce us to sell at a considerably less price than our commercial price at destination.

They would reject it and call for new bids, which, of course, meant they were not satisfied with the prices quoted, we had quoted, and the same thing had happened several times on the same job.

By the time you got through, if you were a successful bidder, why, you had a price considerably below the standard dealer price at destination.

Q. Do you mean by the use of land grant rates?

A. Well, not entirely by the use of land grant rates, but just telling us that our bid was too high, and if we were going to get any business, why, we would have to bid a price.

Q. You do not mean to say you never sold the Government at your regular commercial delivered price?

A. No, I do not say that.

47327 Q. You made frequent sales, haven't you, on that basis?

A. Well, our direct sales to the Federal Government through the years have been rather small in volume, but I cannot recall right now—well, there have been some purchases made where we got the dealer price at destination.

Q. Regular commercial price at destination?

A. Yes, but as to the number, the number concerned here, I do not know.

Q. Now, was there any particular period of time or any particular point of time where you changed your policy with regard to quoting the Government the commercial delivered price?

A. Yes.

Q. When was it?

A. We quoted them as far back as I can remember, both at times, both our price at destination and the price f.o.b. mill; when they requested a price f.o.b. mill, and then later, along in the Code period, we quoted them with a control clause.

Q. Well, during the period when you were quoting them both delivered and f.o.b. mill, how did you determine your f.o.b. mill price?

A. By deducting from the lowest price, we found at destination, the rail freight to our mill.

Q. In other words, you gave the Government 47328 then the benefit of the same mill net that you were obtaining from the dealer at that same destination?

A. Yes, sir.

Q. Have you ever quoted the Government f.o.b. mill without knowing what the destination was?

A. Not to my recollection.

Q. Now, you testified on direct that your mill nets in Milwaukee were not greatly different from your average mill nets.

What were your average mill nets, and what were your Milwaukee mill nets?

A. Well, I do not have the exact figures in mind, but I do have in mind the difference, and as I recall it, is was approximately fourteen cents a barrel less than we netted in Milwaukee than our average mill nets at that time I was talking about.

Q. And what time was that?

A. That was the time we were supposed to have had a warehouse in Milwaukee.

Q. And what year was it?

A. Well, I believe it was around about 1930, around there some place.

47337 Washington, D. C.,
Monday, October 28, 1940.

47338 RAYMOND W. MOORE, thereupon resumed the stand and testified further as follows:

Cross-Examination (Continued) by Mr. Wooden.

Q. Mr. Moore, referring to Commission's Exhibit 971-13-D, being a letter from Professor Burns to your Mr. Ward, dated June 17, 1935, were you familiar with that correspondence at the time that it was taking place?

A. I believe I saw the letter. I do not know exactly when I did see it.

47339 Q. Did you see Mr. Ward's letter on June 12th that is referred to in that letter?

A. I think I saw it after he wrote it.

Q. And before it was dispatched, do you mean?

A. I don't know as to that.

Q. Can you say whether or not, following that correspondence, another questionnaire covering the Dewey, Okla., mill was sent in to Professors Clark and Burns?

A. I cannot say.

Q. Now, directing your attention to your direct testimony regarding the various instances where shipments were made by other mills for the Dewey Company's account, can you say whether or not, in all those cases, the Dewey sales to its customers were made before it made the arrangements with competitors to make the shipments?

A. Yes, sir.

Q. It is true that they did that in all cases?

A. Yes, sir.

Q. Can you say what sort of package was used in making the shipments? Were they shipped in Dewey bags?

47340 A. As I recall, some of them were made in bulk. I do not recall as to the type of bags that the other shipments were made in.

By Mr. Wooden:

Q. Well, do you know anything about the Dewey Company's policy or practice in such circumstances?

A. Well, we sometimes furnished our own bags, and sometimes the other company used theirs.

Q. You mean that sometimes the other companies made the shipment for you in Dewey bags; is that right?

A. Yes, sir.

Q. What determined whether you would have shipments made in your own bags or in the other company's bags?

A. The judgment of our officials.

Q. Can you state what factors determined their judgment?

A. Not now.

Q. Were you one of the officials who participated in forming the judgment?

A. Yes.

Q. Can you not say what factors entered into your own determination of whether to have shipments made in Dewey Company bags or in other bags?

47341 A. As I recall it, it depended somewhat on our stock of bags that were available.

By Mr. Wooden:

Q. Anything else?

A. Not that I can recall.

Q. Well, were any of these particular shipments of unusual size or volume?

A. Yes.

Q. Which ones?

A. Well, the shipments on the contracts were all pretty good sized. Those paving jobs that I testified to I would call good sized jobs.

Q. Running into thousands of barrels, would you say?

A. Yes, some of them, and some of the shipments were small shipments to dealers.

Q. Now, do I understand that you had some dealer customers which shipments were made by other companies for your account?

A. Yes, sir.

Q. Just on ordinary carload business?

A. Yes, sir.

Q. And they were among these instances that you 47342 described on direct examination?

A. Yes, sir.

Q. Now, with regard to that road paving project in Texas, where you bought from Trinity in 1935 for the shipment to your customer, the Harrison Engineering & Construction Corporation, where in Texas was that?

A. Well, the invoices showed the destination. I think there were several destinations. I don't recall just now.

Q. What part of Texas?

A. Well, as I recall it, they were in the central part of Texas.

Q. Were they outside your usual shipping territory?

A. Yes.

Q. And being outside your usual shipping territory, shipment from your mill would have provided you with a mill net that was insufficient?

A. Well, I would not say it was insufficient.

By Mr. Wooden:

Q. Well, it was lower than you were willing to take in ordinary business or it would not have been outside your ordinary territory, would it?

A. Well, we frequently go outside of our ordinary territory in order to get volume.

47343 Q. As I understand it, you did not have any regular customers in that part of Texas were these shipments were made; is that correct?

A. We may have had a few.

Q. You were not actively pressing your business in that territory?

A. We did not want much business in that territory.

Q. You did not want it because the mill net was too low to be satisfactory; is not that correct?

A. No.

Q. Why was it you did not want it, then?

A. We did not want to take on too much of the marginal territory business.

Q. Marginal?

A. Marginal territory business.

Q. Well, does not marginal territory business mean that the mill net is too low to be satisfactory?

A. No; I think not.

Q. Just on the border line, anyway.

Trial Examiner Norwood: It reduces your average; does it?

The Witness: Yes, sir.

By Mr. Wooden:

Q. Do you know what your mill net was on that Texas business?

A. No, sir.

47344 Q. The Trinity Company made that shipment, as I understand it?

A. Yes.

Q. They were much nearer freightwise to the job than you were; is that correct?

A. Yes, sir.

Q. They got a much better mill net out of it than you could have gotten?

A. I believe so.

By Mr. Wooden:

Q. What was the basis of settlement between you and Trinity with regard to mill nets? Did you get a better mill net than if you had made the shipment direct from Dewey?

A. I don't know.

By Mr. Wooden:

Q. Well, unless you got a better mill net by handling it through Trinity, what would be the advantage of making the shipment through Trinity at all?

A. Quicker delivery, satisfying the customer. On
47345 those large jobs it is very important that the customer not have too much cement in transit at any one time, due to the interruption of progress of his work through inclement weather conditions—and in saving demurrage.

Q. It is better for a nearby mill to serve the customer in those circumstances; is that correct?

A. Less liable to have loss.

Q. From the customer's viewpoint it is better.

A. Possibly so.

Q. You do not mean to say, however, that you did not get any better mill net out of those shipments than you would if you had actually shipped them from Dewey?

A. I did not say that.

Q. I say, you do not mean to say that?

A. No.

Q. You do not know?

A. I do not know.

Q. Now, with reference to the shipments made for your account by the Missouri Portland Cement Company to Cave-in Rock on the Ohio River, what was your reason for making that deal with Missouri?

A. To make a profit.

Q. Could you not have made a profit if you had shipped direct from your Davenport mill?

A. The deliveries would not have been satis-
47346 factory to the customer.

Q. Could you have made a profit if you had shipped, yourself, from the Davenport mill?

A. I don't know.

Q. At any rate, did you figure that you got a better mill net there than if you had shipped direct from your own mill?

A. I don't know.

Trial Examiner Norwood: Get an advantage; don't you save something in the matter of transportation?

The Witness: I do not believe that would necessarily follow. There are other conditions that would offset the trnasportation difference.

47347 By Mr. Wooden:

Q. You do not know, even in this Cave-in Rock case, what your mill net actually was as compared to what it would have been if you had the shipment from your own mill?

A. No.

Q. Aren't those considerations that entered into your decision to make the delivery in that way?

A. Our principal—

Trial Examiner Norwood: Wait a minute. Just answer his question, if you will.

The Witness: I was going to.

Trial Examiner Norwood: He did not ask you for the principal consideration. He asked you if this was one consideration.

Does that enter into the decision at all?

The Witness: Well, we consider it.

By Mr. Wooden:

Q. But you do not know what the outcome of that consideration was?

A. No.

Q. Now, with reference to the shipment by Penn-Dixie at Milan, is that Tennessee?

A. That is right.

Q. In 1934. That was outside of your usual sales territory, wasn't it?

47348 A. Yes, sir.

Q. Was that a shipment to this same contractor customer?

A. Yes.

Q. A large shipment?

A. Yes.

Q. Do you know what your mill net was on that compared to what it would have been if you had shipped from your own mill?

A. It occurs to me that there was no mill net realization on that or on any of these shipments.

Q. Well, you got payment of so much per barrel, didn't you, from somebody?

A. That is true, but that was not a mill net.

Q. Well, what was it if not a mill net?

A. Well, it was the difference between what we sold it for and what we bought the cement for.

Q. Well, it involved a mill net, at any rate, to you at your mill, didn't it?

A. No, because we did not ship it from either of our mills.

Q. It involved the net realization to you, didn't it, per barrel?

A. Net realization to the company, yes.

Q. That is what I mean.

A. Yes.

Q. And you do not know what that net realization was compared to what it would have been if you had
47349 shipped it from your own mill.

A. No.

Q. As a matter of fact, it was more than if you had shipped it from your own mill, wasn't it?

A. I don't know.

Q. Now, regarding your shipments or shipments by the Monarch Company for your account in 1935. I understand there were two such shipments to Wichita and Neodesha, Kansas; is that correct?

A. Yes.

Q. Were those shipments outside of your usual territory?

A. No.

Q. Who was the customer involved? The same customer in both of these cases?

A. Yes.

Q. Who was that?

A. Harrison Engineering & Construction Corporation.

Q. The same one?

A. Yes.

Q. Are those the only shipments for your account by any of your competitors during 1935?

A. No, I think the Universal shipped some for our account in 1935.

Q. Wasn't that in 1937?

A. Well, they shipped some in 1937, also, as I recall.

47350 Q. What total volume of shipments was made for your account in 1935 by competing mills?

A. I do not know the number of barrels.

Q. Well, what percentage of your total shipments was made by competing mills for your account during that time?

A. I do not know.

Q. Was it as much as 10 percent?

A. I do not know.

By Mr. Wooden:

Q. Was it as much as 25 percent?

A. I do not know.

By Mr. Wooden:

Q. You can't give us any idea whether or not the shipments by competing mills for your account in 1935 were a small or a large percentage of your total shipments?

A. No, sir.

Q. Out of the Dewey mill?

A. I would say they were small.

Q. That is all I am trying to get at.

And what is your conception of small?

47351 A. Oh, possibly around 2 percent, or something like that.

By Mr. Wooden:

Q. Were those shipments by Monarch and Universal in 1935 shipped at the regular destination price?

A. So far as our company is concerned?

Q. Well, so far the customer was concerned.

47352 A. Yes, sir.

Q. As I understand it, the Universal shipments in 1935 for your account went into Illinois and Minnesota; is that right?

A. Yes, sir.

Q. Were the Illinois and Minnesota shipments in 1935 out of your usual territory?

A. No, sir.

Q. Were your mill nets on these shipments in 1935 for your account less or more than they would have been if you had made the shipments direct from your own mill?

A. I do not know what the mill nets were.

Q. And you can't answer without knowing what they were?

A. No, sir.

Q. Were those shipments made outside your usual territory?

47353 A. No, sir.

Q. Do you know whether your mill net realization on those shipments was less or greater than if you had shipped them from your own mill?

47356 Q. What is the answer, Mr. Moore?

A. No.

Q. You do not know?

A. No.

Q. How long was this strike at Davenport in effect in 1937?

A. About eight days, complete tie-up, and for several days after that getting back in shape to run again. There were shortened—

Q. And these shipments all took place in that eight days, did they?

A. Well, I am not positive about that. There was a threat of strike before for a couple of months before they did strike. We had—

Q. What eight—or, pardon me. What eight days were they?

A. Well, as I remember it, was from a Saturday to a following Monday.

Q. What month?

A. I believe it was in—well, I just don't remember. It seems to me like it was in September, although I may be mistaken.

Q. It was that time of year, anyway, wasn't it,—the fall, you say?

A. Well, I can't be certain about that.

Q. You do not know what part of any particular month it was?

47357 A. Well, I think it was in the first part of the month; that is the way I recall it now.

Q. As a matter of fact, wasn't it prior to July, 1937?

A. Well, I do not believe it was.

Q. Well, you did not submit anything in response to a subpoena covering these shipments for your account later than July, 1937; did you?

A. Well, I think we submitted everything that was called for by the subpoena.

Q. And no more?

A. I do not think so. As I recall it, the contract was made with the labor union along about May.

Q. You mean the prospect of a strike, you mean, or the strike itself?

A. That is where we made a contract with the labor union, about May, then it seems it was about 60 days after that that they went out on strike in violation of the contract. I just can't fix that in my mind definitely.

Q. That would have been prior to September?

A. Yes, that would have been prior to September. That would have been along in July.

Q. As I understand it, when Dewey filed prices with the N.R.A. Code Authority it filed copies of its current price schedules used by its salesmen; is that correct?

A. Yes, sir.

47358 Q. You didn't make a special survey of the various destination prices for the special purpose of filing with the N.R.A.?

Q. You just turned in the ones that you had been using?

A. Yes.

Q. Now, there were put in evidence as Respondents' Exhibits 3621 and 3622 the Arkansas and Kansas salesmen's lists; do you recall that?

A. Yes.

Q. Can you point out any destinations on those two lists where the deliver prices were not the equivalent of some base price plus freight from some basing point?

A. No.

By Mr. Wooden:

Q. Now, referring to the Illinois sales list that was also put in evidence as Respondents' exhibit, can you point out any destinations on that list where the delivered prices

were not the equivalent of some base price, plus freight, from some basing point?

47359 A. No.

By Mr. Wooden:

Q. Well, I am showing you those three lists, which are Respondents' Exhibits 3621-A to H, 3622-A to V, and 3645-A to Z-17, and, if you can, I would like to have you point out any destinations where the delivered price was not the equivalent of some base price, plus the freight from some base point (handing the exhibits to the witness).

A. I can't do it.

By Mr. Wooden:

Q. Now, you testified on direct examination that since the N.R.A. Code 25 to 30 percent of your total business had been with the Federal Government, either directly or indirectly; that is, on projects or on jobs for which federal funds were used; is not that correct?

A. Including W.P.A.

Q. Yes. Of that total business, how much was sold direct to the Federal Government?

A. I don't know.

47360 Q. Out of the total business paid for with federal funds, how much was sold direct to the Government?

A. I can't say.

Q. Was it the larger or smaller part of the total Government sales?

A. The smaller part.

Q. Decidedly the smaller part of the whole was sold direct?

A. Yes, sir.

Q. I will put it in another way: Approximately what percentage of the business paid for with federal funds was sold direct and what percentage through dealers?

A. I can't give you that.

Q. Was some of it sold to contractors?

A. I believe so.

Q. As I understand it, the smaller part was sold direct; is that correct?

A. Yes, sir.

Q. Is it not a fact that you had many dealers who

bought less cement from you in the course of that period than the Government bought?

A. What do you mean by "many"?

By Mr. Wooden:

Q. Well, you had a number, then—I will put it
47361 that way—you had a number of dealer customers who bought less than the Government bought during that period?

A. I would think so.

47377 Q. Now, regarding this testimony of yours concerning the flat freight rate for the Kansas Gas Belt mills beyond a certain distance, is that a 70-mile or an 80-mile distance?

A. It has resolved itself down to approximately 80 miles now.

47378 Q. Eighty miles from what?

A. The nearest mill.

Q. You mean, in other words, the nearest mill to any particular shipping point?

A. Yes.

Q. When did that flat rate go into effect?

A. When you speak of "flat rate," do you mean a group rate from the other mills—from all mills?

Q. Well, perhaps we had better have you explain it. I understood that after a distance of 70 miles the rates were the same from all mills; is that correct?

A. Yes. We don't call that a "flat rate." We call that a "group rate."

Q. All right, let us call it a "group rate," then. When did that go into effect?

A. That was in effect from the time we built our Dewey mill.

Q. What year was that?

A. 1907.

Q. What was it that I understood you to testify about on direct, to the effect that the various mills contended that the rate should be the same from various mills after a certain distance.

A. That was the contention of the Gas Belt group of mills, that after you got beyond 70 miles—at that time, it was—that they should all be grouped at the same freight rate.

47379 Q. When was that contention made?

A. Well, that was the contention when I went with the company in 1912.

Q. You mean that they were contending merely that what had been in effect since 1907 or longer should be continued in effect; is that what you mean?

A. Well, yes, that is substantialy it. The Gas Belt group grew up by the building of the first mill at Iola in 1900, and as the other mills were built they were given the same rates as Iola by the carriers, and that is how the Gas Belt group grew.

Q. And did it become a question, as to each additional mill as it was built, what its rate relationship would be to those that had the group rates? Is that what you mean?

A. No; I do not know that there was any question about it. When we built at Dewey, according to the records of our company, we were given the same rate adjustment as the mills that had been previously built in that group.

Q. Well, the effect of the group rate was to make the Gas Belt mills, as a group, a basing point; was it not?

A. I don't know.

Q. What difference did it make in the pricing methods of the Gas Belt mills as compared to the situation before the group rate was put into effect?

Mr. Seeley: I object, Your Honor. There is no
47380 evidence or testimony by this witness that the rate structure did make any pricing basis or price difference.

Mr. Wooden: I asked him what difference it made.

Mr. Seeley: Then, I ask that a preliminary question be put to him.

Trial Examiner Norwood: Read the question.

(Question read.)

Trial Examiner Norwood: Objection overruled.

A. Well, I don't know that it made any difference. The first mill was at Iola, and as the second mill was built it was given Iola's rate basis, and so on, until the last mill was built in the group.

By Mr. Wooden:

Q. Did Dewey get into that group when it was built?

A. Yes, sir.

Q. The Dewey mill.

A. Yes, sir.

Q. How were delivered prices figured within that 70-mile distance?

A. Well, our prices were as low as the prices of any competitor we found at any destination in that area.

Q. Was there not some base mill within that 70-mile area—

Mr. Seeley: Can we have the time fixed, Your Honor?

Trial Examiner Norwood: I do not think so.

Mr. Seeley: I submit the question is vague.

47381 Trial Examiner Norwood: Go ahead and answer that question.

A. Well, there have at times been base mills in that area.

By Mr. Wooden:

Q. Independence?

A. It has been at times.

Q. Iola?

A. Yes.

Q. What I want to know is what relationship between those base mills in the Gas Belt was to the delivered prices within that Gas Belt local area, inside of the 70 miles distance.

A. Well, I believe that the destination prices that we found in that area generally would check back to one of those mills.

Q. Which one?

A. Well, the—

Mr. Seeley: I object, Your Honor. I ask that the time be fixed.

Trial Examiner Norwood: Objection overruled.

A. It would differ as to the mill, whether or not they had a mill base.

By Mr. Wooden:

Q. Well, do you mean that sometimes there was no base at Iola, while there was one at Independence, or what?

A. No; the other way around. Sometimes there was at Iola and none at Independence.

47382 Q. Was there a time when there was a base at both points?

A. Yes.

Q. And did each base then control the delivered prices inside this 70-mile area, the 70 miles distance?

A. Well, the destination price we found would check back generally to one of those mill bases. Which mill it checked back to would depend upon the freight rate to the destination and the mill bases at the particular time.

By Mr. Wooden:

Q. That is within the 70-miles distance?

A. Yes.

Q. And when you got out beyond the 70-mile limit then was the base the same for all the Gas Belt mills?

A. No, we did not have any base excepting that short period of time at Dewey.

Q. Well, the rate from Iola, was that the same as from all the other Gas Belt mills to points beyond the 70-mile distance?

A. Yes.

Q. Then the rate from Iola to points beyond the 70-mile distance was the rate that was reflected in delivered prices beyond that distance; is that right?

A. Well, I do not think it is necessarily true. The
47383 mill base at Iola could have been higher than the mill base at Independence, and then in that case the destination price would check back to Independence.

Q. I am talking about the group rate on the 70-mile limit.

A. Yes, that is what I am—

Q. That sometimes would check back to either of these two mills?

A. Yes, sir.

Q. Did the Independence mill have the same rate as Iola, distance 70 miles?

A. Yes, sir.

Q. In other words, as far as freight was concerned, it did not make any difference which you checked back to?

A. That is right.

Q. What did this Iola traffic bureau do?

A. Well, it tried to obtain adjustments in freight rates from the Gas Belt mills that would be reasonable in and of themselves, and not unjust or discriminatory, as compared with rates from mills outside the Gas Belt group.

Q. Well, did the Iola bureau, was it a body that contended that the rates should be all the same on 70 miles limit?

A. You mean the Iola Cement Traffic Association?

Q. Yes.

A. After it came into being it contended the same as the individual mills had contended before that time.

47384 Q. When did it come into being?

A. Well, as I recall, it was about 1914, around that time.

Q. Did the Iola Cement Mills' traffic bureau—

A. Association.

Q. —compile or distribute any freight rate information among the mills?

A. No, sir.

Q. Did it do anything other than what you have already described?

A. No, sir.

Q. Now, this case before the I. C. C., 20303, did that case take up the questions or include questions of the relation between rail and truck transportation?

A. Yes, sir.

Q. And was this map which is in evidence as Commission's Exhibit 2188 used in that connection as—

A. No, sir.

Q. It was used in that case, wasn't it?

A. No, sir.

Q. What was this map, Commission's Exhibit 2188, used for?

A. That was an exhibit in Ex Parte 103, which was a 15 percent revenue case.

Q. Well, didn't Ex Parte 103 have anything to do with relationships between truck and trail transportation?

A. No, sir; I don't think it did.

Q. Well, why was this map, Commission's Exhibit 2188, put in evidence in the Ex Parte 103 case then?

A. As an argument why the carriers should not increase their rates.

Q. And the argument was that if they increased their rate the disparity between truck and rail rates would be still further increased?

A. I do not think that that was the argument. I think the argument based on that exhibit was that any further increase in the rates, rail rates, might result in trucking, and—

By Mr. Wooden:

Q. Increased trucking?

A. Well, I do not know so much about increased trucking—might result in trucking which would reduce the

revenues of the carriers and defeat the purpose they were trying to achieve.

47386 Q. Now, do I understand your direct testimony to be that this map was put in evidence in that case by the Iola Cement Mills Traffic Association in which you were represented?

A. Yes, sir.

47389 Q. This exhibit, Commission's Exhibit 2188, as I understand it, was put in evidence in Ex Parte 103 as reflecting the views of the various cement mills in the Iola Cement Mills Traffic Association.

A. Well, I do not know that it is correct. The Association functions through a general traffic manager, and the members are not familiar at all times with everything that he put in evidence in these various rate cases.

Q. Is that Mr. Glover?

A. Yes.

Q. Did you participate in any way in the preparation of this map?

A. No, sir.

Q. Did you supply any information that is reflected in it?

A. No, sir.

47390 Q. What was the purpose, Mr. Moore, of the various mills contending for a group rate beyond the 70-mile limit?

A. Well, that is about the only way that rates can be published from that particular group of mills, owing to the criss-cross of routes from those mills. The lines of railroads radiate from that group in such a way that once the rates are grouped it is necessary to have permission from the Interstate Commerce Commission to deviate from the long and short-haul clause of the Interstate Commerce Act, and the Interstate Commerce Commission has not given that permission.

Q. Well, why was it necessary to deviate from that?

A. Well, if you did not have the permission of the Commission there would be violations wholesale in number of the fourth section of the Interstate Commerce Act.

Q. You say they would have to deviate from it in order to do what?

A. I do not believe I understand your question.

Q. Well, isn't this the fact, that what you meant is they would have to deviate from this long-and-short-haul re-

quirement or conflict with it in order to meet competition at destination?

A. No, no, that did not have anything to do with the freight rate adjustment,—competition at destination.

Q. Well, to meet competition at destination, do you mean to say that mills do not have to adjust their freight rate?

47391 A. Well, the mills can't adjust the freight rates, that is within the purview of the railroads and the Commission.

Q. Of course, they can't change the freight rates themselves, but they can make an adjustment which offsets the difference in freight rates, make an adjustment in their mill nets that offset the freight rates?

A. Well, I do not know how to answer that. As far as we are concerned, of course, we look at the destination prices.

By Mr. Wooden:

Q. Well, Mr. Moore—

A. I don't quite understand what you want to know, Mr. Wooden.

Q. When you say that without this group freight rate out of the Gas Belt—

A. Yes, sir.

Q. (Continuing.) —the mills that would have been built would be required to deviate from, or, rather, to—

A. No; I said the carriers. I did not say the mills would deviate. I said the railroads.

47392 Q. Well, suppose the railroads had not done it, then what?

A. Well, they would have had to go out of the business over a large part of the territory. They wanted to keep the freight rate adjustment so that mills on their lines could compete in that territory tributary to the Gas Belt.

Q. In other words, without the group rate the railroads would have been violating the long-and-short-haul clause if they had permitted the mills on their respective routes to meet the competition of other mills at destination?

A. No, sir; I do not think that is right.

By Mr. Wooden:

Q. Why and how would the railroads have violated the long-and-short-haul provision of the Interstate Commerce Act if they had not had a group rate?

47393 A. Well, they could not publish rates to a destination from a mill point in the Gas Belt that would

be lower than the rate at some intermediate point which would be set up for the route from some other mill in the Gas Belt, and in order for the carriers to participate in the traffic to all the points throughout that territory they had to be able to maintain the same rates from all mills on their respective lines.

By Mr. Wooden:

Q. Why was it necessary, or it was not any more necessary for the carriers to participate in all the traffic than it was for all the mills to participate in all of the business to the various points?

A. As far as Dewey is concerned, the railroads serving Dewey felt that they wanted to get all the traffic they could from Dewey, just as we felt that we wanted to sell all we could. It was to the mutual interest to do that.

Q. If they had not wanted to participate in all of the traffic they could have carried on without violating the long-and-short-haul clause?

A. Well, if they had wanted to have gone out of the business they could have done so.

47394 Q. The effect, anyway, was to equalize the transportation factor at the delivered price out of the Gas Belt into destinations beyond the 70-mile limit; is not that right?

A. Well, not necessarily. The destination price might not have been due to the influences from the Gas Belt.

Q. Well, I said the transportation factor in it.

A. You said the transportation factor in the delivered price.

Q. In the delivered price.

A. Well, it might not have been the Gas Belt that had anything to do with the making of the delivered price.

Q. Well, wherever the Gas Belt made the delivered price it equalized the transportation factor in it; did it not?

A. Well, beyond 70 miles the transportation cost was the same from all Gas Belt mills.

Q. And there was a territory beyond the 70-mile limit where the Gas Belt mills made the delivered price?

By Mr. Wooden:

Q. Is that right?

A. Well, at times, yes.

47395 Q. Now, Mr. Moore, in quoting railroads f.o.b. junction point, that is, quoting a railroad that did not serve your plant, when you quoted your f.o.b. junction

point to a road that did serve your plant, how did you determine the delivered price applicable f.o.b. junction point?

A. Well, we tried to ascertain what price was being made to that carrier by competitors located on the line of that carrier.

Q. Anywhere on that line?

A. Well, within reason. We had to exercise our judgment as to the location of the other mills that we were trying to compete with.

Q. Well, there were some junction points on railroads where there were no towns at all; were there not?

A. Well, we did not ever have that situation, as I know of, in quoting railroads.

Q. You would not know how to quote a railroad f.o.b. junction point unless there were a town there?

A. No, if there was not a town there there would not be any rates to the point, to begin with.

Q. No rate on your own road to that junction point.

A. No. If there was not any town there, there would not be any rate there.

47396 Q. Do you ever quote a railroad f.o.b. junction point by figuring on the nearest town?

A. No.

Q. When you quoted f.o.b. mill to the Federal Government, even there you were attempting, were you not, to make your f.o.b. mill quotation such as would be effective in meeting competition at destination?

A. Yes.

Q. And your use of the contract clause you considered as a factor in increasing your ability to meet competition at destination?

A. Yes.

Q. Now, regarding these so-called Good Friday bids, I understood you to testify on direct that you refused to bid on those requests because the time of delivery, the amount to be taken, and the place of delivery were too indefinite; is that correct?

A. Too much uncertainty about it; yes.

Q. In other words, there was no place of delivery specified; that is right, is it not?

A. Yes, sir.

Q. Now, as to the time, was not that to be delivered over a period of some months—three months?

47397 A. Well, there was nothing definie as to the deliveries that might be called for in any particular month. I don't know as to the three months' period you speak of.

By Mr. Wooden:

Q. Now, as to the amount, you were permitted, were you not, to bid on any amount that you were willing to ship up to 3,000,000 barrels?

A. I don't know. It may have been open.

Q. Well, you said the amount was too indefinite.

A. Yes.

Q. You could have made it very definite yourselves by saying you would bid on so many barrels, whatever satisfied you.

A. Well, we just considered the whole thing was too indefinite to give any consideration to.

Q. As a matter of fact, has not the Dewey Company shipped on State requirement contract without know-

47398 ing the amount that would be called for at any particular time?

A. No; our contracts generally have a maximum quantity inserted in them that can be called for in any 30-day period.

Q. You could have inserted a maximum in your Good Friday bid if you had been inclined to do so; could you not?

A. Well, nothing could have kept us from doing it is we had been inclined to do so.

Trial Examiner Norwood: Well, could you have done that without violating the terms the terms of this invitation, so as to cause the bid to be thrown out?

The Witness: Well, I don't know. That is what happens lots of times. When we put in terms that violate the terms of the invitation, our bids are rejected for that reason.

By Mr. Wooden:

Q. Did not this information permit you to fix, in your own discretion, a maximum amount for which you would be responsible up to 3,000,000 barrels?

47399 By Mr. Wooden:

Q. Was it your testimony on direct, or is it now, that you have refused to bid on all Government invitations since the Walsh-Healy Act, where the amount involved was over $10,000?

A. That is what I said, and I still maintain that that was our position up until the past year.

Q. Well, up to July, 1937, do you mean to say that you refused to bid even where you knew the destination, where you knew the amount, and where you knew the time of shipment, if it amounted to more than $10,000?

A. Yes, sir.

Q. And that continued until after this complaint issued?

A. Yes, sir.

Q. I understood you to testify on direct examination that prior to N. R. A., the Dewey Company quoted both f. o. b. mill and delivered on Government business; is that correct?

A. I said that. I must have been mistaken about bidding f. o. b. mill.

Q. Now, what is your testimony?

A. Well, I don't recall, after thinking it over, that we did bid f. o. b. mill. We bid f. o. b. destination.

By Mr. Wooden:

Q. In other words, your f. o. b. mill bids to the Government have been since the N. R. A. went into effect?

A. I believe that is correct. The requests before that time were for f. o. b. destination prices.

Q. And where you did bid f. o. b. mill since the N. R. A., are those the cases where you bid with the use of the control clause?

A. I believe so.

Q. And where you used a control clause in connection with an f. o. b. mill how did you determine what the figure f. o. b. mill should be?

A. By taking the lowest price we could find at destination and deducting from that, or the lowest—I will say or the lowest price we might figure would be made at destination by use of land-grant rates and deducting from that the rate from our mill to that destination.

Q. Did you ever deduct the commercial freight rate from the destination price in order to get f. o. b. mill figure to bid to the Government?

A. Yes, sir.

Q. When did you do that?

A. Well, whenever that was the rate we had to deduct in order to get a mill price.

Q. In other words, where there was no land-grant rate or special rate?

47401 A. Yes, sir.

Q. Wherever there was a special or a land-grant rate then you did not deduct the commercial; is that correct?

A. Do you mean from our mill where there was no special land-grant rate from our mill?

Q. Well, answer it that way first, yes.

A. That is correct.

Q. Where there was no land-grant rate from the basing point which was involved in the particular destination price, then what did you deduct?

A. Well, that is presuming that the destination price was affected by some mill base.

By Mr. Wooden:

Q. Yes. You don't say that the destination price is not affected by the mill base; do you?

A. Yes, sir.

Q. No relation between the mill base and the
47402 destination price?

47403 A. In some cases that is not correct.

By Mr. Wooden:

Q. But you have testified that in most cases it was correct, that there was a relation between the mill base and the delivered price, didn't you?

A. Not as to this Government business that we are talking about now.

Q. Well, there is a relation, is there not, even on the Government business by reason of the fact that you start with the delivered price and figure back from it, don't you, to find out what you quote f.o.b. mill?

A. Well, we don't always figure back on Government business to a mill that has a base.

Q. How do you arrive at it then?

A. Why, figure it back to some mill that has a land-grant rate that might control the destination cost.

Q. Do you mean some mill base with a land-grant rate that might control?

A. No, I do not mean that at all. I mean that a mill that does not have a base, can control the price.

Q. Do you mean to say that a mill that is not a base
mill will control the destination price and has con-
47404 trolled destination prices to the Government because it had a land-grant rate?

A. I am positive of that.

Q. In other words, it did not act as a non-base mill in making such quotations; is that correct?

A. Well, there was not any question of it acting at all. It was a question of what we figured was the competition.

Q. Now, you testified on direct, didn't you, that you took the lowest land-grant rate into account; is that correct? I want to ask you from where, the lowest land-grant rate from where?

A. Well, from any mill that we considered might be a competitor for the particular cement that was involved.

Q. Well, if you did not—if the destination involved happened to be one where you were applying the freight rate to some base, you would not know what some other mill's price was, would you?

47405 A. It is a little hard for me to understand that.

Trial Examiner Norwood: Read the question again.

Mr. Wooden: Use the word "that" instead of "some other"; make it "that."

(Question read as follows:

"Q. Well, if you did not—if the destination involved happened to be one where you were applying the freight rate to some base, you would not know what that other mill's mill price was, would you?")

By Mr. Wooden:

Q. That other non-base mill's price?

A. Well, I can answer that in this way: Taking the destination price that we thought we would have to meet and deducting from that the land-grant rate—lowest land-grant rate—from some competing mill in that particular market, would give us a figure that we would have to meet, if we were going to quote for delivery at that same destination.

47406 Q. But wouldn't you figure in that case back to some prevailing base price?

A. No, it does not follow at all.

Trial Examiner Norwood: Do you mean you get this constant figure to which you would add freight to other points without knowing what base that was?

The Witness: It need not be a base, Your Honor. It can be any mill with a land-grant rate whether it is basing mill or not, that would be competing at the particular destination.

By Mr. Wooden:

Q. Then, do you say that—

Trial Examiner Norwood: Do you ever get those figures from deducting freight unless it is a base mill?

The Witness: Oh, yes.

Trial Examiner Norwood: Get those constant figures.

The Witness: Well, it is not the same figure in every instance. It is a figure that varies with the deductions that you have to make—land-grant deductions from the destination prices, which also—

Trial Examiner Norwood: Figure it back to a non-base mill; doesn't that make it a base?

The Witness: No; we just do that in trying to ascertain what competition we are going to meet.

By Mr. Wooden:

47407 Q. Well, don't you expect that non-base mill to figure on the base mill's freight to prices?

A. No. We are guided by the destination price.

By Mr. Wooden:

Q. Which I understand you to agree is ordinarily the equivalent of some base price plus freight.

A. Well, that is quite generally what makes the destination price.

Q. And in the case of a Government bid at that destination, I understand you deduct the freight back until you get some constant figure?

A. No, not from the same mill; we deduct the freight back to the mill that has the lowest land-grant rate, whether it is a base mill or not, a mill with a base.

Q. Do you mean to say that it has been the Dewey Company's policy and practice to depart from the use of the basing-point plus freight in making bids to the Government?

A. Well, our practice has been as I stated.

Q. Well, can't you tell me whether it has been your policy and practice to not use the basing-point method in bidding delivered prices to the Federal Government?

47408 A. Well, we started with the destination price and figured it out as I have said.

Q. Back to some base or back to any mill who has the lowest freight?

A. It is figured back by the use of the lowest land-grant

rate from any mill we figure will be competing for the business.

By Mr. Wooden:

Q. In other words, you make your bid not, you might say, to meet the competition of the base mill whose delivered price you started with but to meet the competition of some mill who had a lower freight rate than the base mill; is that right?

A. We make our price as low as we figure that any other mill will make in quoting on that business regardless of whether it is a basing mill or non-basing mill.

By Mr. Wooden:

Q. And don't you expect the mill with the low transportation to also meet the competition of the base mill?

47409 A. Well, there are times when other mills figure the same way we do as evidenced by the bids after they are made up there and they draw straws to see who gets the business.

Q. Referring to this Toledo, Iowa, case or cases that you testified about on direct, I understand you bid there with a control clause.

A. No, that was before the control clause, I believe.

Q. And did you f.o.b. mill then?

A. Yes, sir.

Q. And how did you figure your f.o.b. mill price before the control clause?

A. By taking the dealer's price at Toledo and deducting from that what we figured the land-grant rate was from Dixon, Ill.

Q. That was a basing point?

A. No, at that time I am quite sure it was not, and adding—deducting from that and quoting that as our mill price, quoting the difference, I should say, as our mill price.

Q. Did the Davenport mill have a land-grant rate on that?—

A. Yes, sir.

Q. —job?

A. Yes, sir.

Q. Was it lower than Dixon?

A. It was higher, I think.

Q. You figured on the Dixon rate, then, for what purpose?

A. To demonstrate what the cost at destination
47410 to the Government might be that we would have to meet.

Q. Was Davenport nearer Toledo than Dxon, or what caused Dixon's rate to be higher?

A. They had a greater land-grant deduction than Davenport.

Q. Do you say that in that case the delivered cost to the Government from the Medusa mill was higher than the delivered cost from your Davenport mill?

A. Yes, sir; than it would have been from our Davenport mill.

Q. You said the Government admitted an error in figuring the land-grant rates; is that right?

A. Yes, sir.

Q. Did they also admit an error in awarding the business to a bidder whose bid made the highest delivered cost?

A. Well, only by inference. They admitted that our figure with the land-grant rates were correct, and that our price was lower than the price on the award.

Q. Do you say the delivered cost in buying from Medusa was higher than it would have been in buying from you?

A. Yes, sir.

Q. I understand that the use of the control clause, according to your direct testimony, that that gave you what you considered proper protection against that sort of thing that happened in that Toledo, Iowa, case?

A. Well, it relieved us of any necessity of figur-
47411 ing the land-grant rates and trying to convince Government officials as to what rates were correct and what were not.

Q. Well, did you not say on direct examination that the control clause gave you proper protection against—

A. I don't recall having said anything about protection.

Trial Examiner Norwood: That was a question directed to his previous testimony. He asked him if he did testify so, or if he did not: Now, your objection conveyed to him the idea that he had not testified that way.

Mr. Seeley: I object to the question which was twice put by Mr. Wooden, in which he phrased what he professed to be the witness' testimony on direct, a reference to the phrase "proper protection"—

Trial Examiner Norwood: Wait a minute. He asked him if he did not testify so and so, and you have told him that he did not.

Mr. Seeley: No, Your Honor.

Trial Examiner Norwood: That is exactly it.

Mr. Seeley: May we have that read?

Trial Examiner Norwood: That is the kind of objection I do not like.

Mr. Seeley: May we have it read?

47412 Trial Examiner Norwood: There is no use in reading it. That is what it is.

Go ahead.

Mr. Wooden: Well, I made a note at the time, Your Honor, that he made such a statement. If I do not find it, I will be glad to—

Trial Examiner Norwood: Go ahead.

Mr. Leisure: If Your Honor please, since the point has been raised, Mr. Wooden has been examining the witness incorrectly in that way for a long time. Mr. Wooden well knows that if he wants to examine him on his testimony, the proper way to do it is to confront him with the printed record.

Trial Examiner Norwood: I think not. He has a right to test him by asking him if he did not swear so and so, or if he did swear so and so.

Mr. Leisure: He has the right to do that if he quotes him correctly, but if he misquotes the record he has no right to do so.

Trial Examiner Norwood: I do not think he is confined to quoting the record correctly. He does not have to quote the record at all.

Mr. Seeley: The reason that I asked that the record be read, the last two questions and answers, is to show Your Honor that the witness, prior to the time I made my
47413 objection—and it it is on a misstatement of the record—the witness had already stated that that was not his testimony, and my objection went to Mr. Wooden's repetition.

Trial Examiner Norwood: He has a right to cross-examine him and ask him if he would swear the same way both times.

Mr. Seeley: But he had already done it, and my objection went to the second question of Mr. Wooden.

Trial Examiner Norwood: Well, he had a right to ask him again.

Go ahead.

By Mr. Wooden:

Q. I understand your testimony to have been, Mr. Moore, that the Dewey Company filed no land-grant rates with The Cement Institute; is that correct?

A. I don't recall that we filed any.

Q. Well, is your testimony merely that you do not recall, or that you never did—which is it?

A. I don't recall that we ever did.

Q. You are not intending to testify that you never did?

A. No.

Q. The Dewey Company received a land-grant rate from The Cement Institute, did it not?

A. It may have on one or two occasions.

47414 Q. Do you mean to say, as the traffic manager of the Dewey Portland Cement Company, you did not regularly and frequently receive land-grant rates from The Cement Institute?

A. That is what I say.

Q. I mean during the period that The Cement Institute was distributing.

A. It seems to me I can recall having received a few land-grant rates from The Cement Institute, but we did not rely on them at all. We get our own rates from the railroads.

Q. Do you testify that your sales department made no use of them?

A. Our sales department used the rates; our traffic department furnished them the land grants as well as the regular commercial rates.

Q. Do you testify that your sales department did not use the land-grant rates furnished them by The Cement Institute?

A. Well, I am sure The Cement Institute never furnished the sales department direct any land-grant rates; at least, I never heard of it if they did.

Q. Were you not on the mailing list to get all the land-grant rate information that The Cement Institute sent out?

A. I don't know.

Mr. Woden: Let me have Respondents' Exhibit 3626.

(The exhibit was handed to Mr. Wooden.)

By Mr. Wooden:

Q. Showing you Respondents' Exhibit 3626, 47415 which is a tabulation, is that a tabulation that was made up in your office (handing the exhibit to the witness)?

A. No, sir.

Q. Who made it up?

A. Well, that is a compilation that I received from the A. T. & S. F. Railway Company. I don't know who made it up.

Q. Is it your testimony that the sheet itself, or all the information on it, was furnished in that exact form by the Santa Fe Railway?

A. That is my recollection of it.

Q. What about this heading here "Compiled from Rates Per Hundredweight furnished by the A. T. & S. F."?

A. I don't know about that.

Q. You do not really know, do you, that that compilation was made up by the Santa Fe, or whether it was compiled from rates furnished by the Santa Fe?

A. All I know is that this was furnished by the Santa Fe at my request for rates to those points.

Q. You mean the rate information or the tabulation?

A. The tabulation.

Q. The tabulated information?

A. The tabulation itself.

Q. Were all these rates shown on this sheet of paper, rates from mills located on the Santa Fe Railway?

47416 The Witness: May I see the exhibit?

Mr. Wooden: Yes (handing the exhibit to the witness).

A. No; they are not all on the Santa Fe.

Q. Mr. Moore, which of the headline points on Respondents' Exhibit 3626 were not located on the Santa Fe Railroad?

A. Hannibal, Mildred, Marquette, St. Louis.

Q. And all the others are on the Santa Fe?

A. I am uncertain about Ada. There was a short line railroad serving Ada that the Santa Fe acquired, and whether they had acquired it yet at that time I do not recall. All the rest of them are on the Santa Fe.

47417 Q. Which of the points listed in the first column to the left are not on the Santa Fe?

A. I do not believe I can point out all of them. Wyandotte, Okla., is not.

Q. Is it easier to state those which are located on the Santa Fe? Do it either way, or both.

A. Well, I cannot do it either way and cover all the points.

Q. Well, cover as many as you can.

A. Well, Chiloco, Okla., is on the Santa Fe; Clinton, Okla., Fort Leavenworth, Kansas, Leavenworth, Kansas, Woodward, Okla. I am not sure about the others.

Q. Well, the fact of the matter is that the points shown on this compilation,—some of the points shown on this compilation do not represent rates from Santa Fe shipping points or to Santa Fe delivered points; isn't that true?

A. Yes, that is right.

Q. And would you say that the Santa Fe did not participate in any of the rates between such points?

A. No, I would not say that.

Q. I mean points where it had no mill located and was not,—where the destination was not on the Santa Fe?

A. It may still be an intermediate carrier.

Q. But you can't say in which cases it was an intermediate carrier?

A. No, that does not show the routing.

47418 Q. I notice this paper is in mimeograph form. Can you explain why that is?

A. No, sir.

Q. Did the Cement Mills Traffic Bureau of Iola put out information like that?

A. No, sir.

Trial Examiner Norwood: Well, did the railroad furnish that in mimeograph form?

The Witness: Just in that form is the way I received it.

By Mr. Wooden:

Q. And you say that the Santa Fe Railroad furnished you land-grant rates from a number of points on which it did not have a shipper of cement, or to some points where it did not deliver?

A. Yes. All the railroads do that all the time. The railroads that we deal with do.

Q. Isn't it a fact that the division of the total rates

among various carriers on land-grant routes is something that makes for considerable uncertainty in which the actual final settlement rate is?

A. Well, one should know what the division of a joint rate is before attempting to compute the land-grant rate.

Q. And don't railroads keep their division rates,—division sheets, rather,—confidential?

A. Well, they have given me divisions and bases
47419 for divisions when I ask for them.

Q. Well, isn't it the general rule, as I stated it?

A. I do not think their divisions are on file with the Interstate Commerce Commission. That is, if they are on file I do not believe they are open.

Q. They don't furnish them to anybody just for the asking?

47420 A. They have furnished them to me whenever I have asked for that. I do not know about others.

By Mr. Wooden:

Q. Well, don't you know as a traffic expert, Mr. Moore, they are not furnished to anybody just for the asking?

A. I do not think they are on public files like their freight tariffs. That is my understanding, they are not. I have never investigated to find out whether it was or not.

Q. I understood you to testify on direct that there was no way to ship from Dewey entirely by land-grant road; is that right?

A. Yes, sir.

Q. And yet Dewey is located on a land-grant road?

A. Yes, sir.

Q. Do you mean there are no destinations on that road to which Dewey ships entirely by that road?

A. No, I do not mean that. I said entirely land grant. The land grant does not extend as far as Dewey, Okla., on either railroad serving that mill.

Q. Oh.

Is it your testimony that you used the control clause on Government business involving land-grant rates in order to give the Government the benefit of the land-grant rates?

A. Yes.

47421 Q. Any other purpose?

A. Well, for the purpose of saving us the work of computing land-grant rates and—

Q. You had no purpose in using the control clause to meet competition at destination?

A. Well, when the control clause was adopted by some of our competitors; why, we saw that as a means of being better able to meet competition at destination and adopted it.

Q. Assume a case where you bid a destination cost with the control clause and the destination cost reflected some base price of a mill that had a higher land-grant rate than your own, you have done that, haven't you?

A. I don't recall that we have.

Q. You do not mean to say that your land-grant rate is the lowest to every point wherever you have figured; do you?

A. Well, I do not have all the points in mind that we figured the land-grant rates to.

Q. Do you mean to say that you have never figured a destination cost to the Government by adding the land-grant rate, as you understood it to be, to the constant mill price of some base mill?

A. I don't recall having done that.

Q. You do not say that you have not done it?

A. No; I don't recall.

Q. When did the Dewey Company first adopt this 47422 guarantee against price decline within five days after shipment?

A. Oh, it was away back in the old days—about 1916, I think, some place.

Q. You do not claim to have been the originator of that five-day guarantee; do you?

A. Yes; I think we do claim that.

Q. Was it five days without changing from 1916 until the N.R.A. Code?

A. I believe it was.

Q. The N.R.A. Code provision regarding the five-day guarantee against decline called for no change in the Dewey Company's policy?

A. It was not necessary for us to make any change, as I recall it.

Q. You also claim to have originated the five-day notice of price advances; is that correct?

A. Yes, sir.

Q. And when was that?

A. Well, it was shortly—a few months after the other matter.

Q. In other words, both of them in 1916; is that right?

A. That is the way I recall it.

Q. If you have a freight rate reduction from your own mill, do you refund the customer for five days' previous shipments?

A. Previous to what?

Q. Previous to the freight rate reduction.

47423 A. Not unless the reduction affected the price at destination.

Q. Well, if the price at destination were reduced just by the exact amount of the freight rate reduction, would you refund your customer the amount of that freight rate reduction?

A. Yes, sir.

Q. In the case of a freight rate increase that causes an advance in the delivered price to the customer, can he buy at the lower delivered price for five days before the freight rate increase actually goes into effect?

The Witness: I am confused about the rate and price. Can I have that question read, please?

Trial Examiner Norwood: Read it.

(Question read.)

A. Well, it all depends when the price is increased. If the price is increased as a result of the freight rate increase, he has five days in which he can place his order—five days from the date of the price increase in which he can place his order for his stock requirements, for shipment within 15 days.

By Mr. Wooden:

Q. The point I am getting at is that if the only advance in the delivered price is the result of a freight rate increase, does the customer get the benefit of that five-day purchase at the lower price?

A. Yes; from the date of the increased price he has five days from that time.

47424 Trial Examiner Norwood: And do the contracts protect them from a freight rise?

The Witness: Yes, sir.

By Mr. Wooden:

Q. Now, is it your testimony, Mr. Moore, that these notices that the Dewey Company originated, the five-day

notice of advance, and the five-day guarantee against decline—that you have adhered to those pretty well, or have you departed from them lightly?

A. We have adhered to them fairly closely.

Q. Will you state wherein the Dewey Company's policy and practice has been different from the policies and practices set forth in the Compendium of The Cement Institute?

Mr. Seeley: I object, Your Honor.

Trial Examiner Norwood: Read the question.

(Question read.)

Trial Examiner Norwood: Are you familiar with that Compendium?

The Witness: No; I do not have it in mind. I recall having seen it, but I could not make a comparison.

Trial Examiner Norwood: Objection sustained.

By Mr. Wooden:

Q. Did you not testify on direct examination that the Dewey Company had never been influenced in any way by the Compendium?

A. I think I said that we have made no change
47425 in our policies as a result of the Compendium. I believe that is what I said.

Q. And you cannot now point out any difference between your policies and those set forth in the Compendium?

A. No; I cannot point it out.

By Mr. Wooden:

Q. I show you now, Mr. Moore, Commission's Exhibit 972-2-Q, which is a part of the questionnaire of your Davenport, Iowa, mill in connection with the Clark and Burns questionnaire. I want to ask you whether it is your testimony now that you do not know whether that document or the document of which it is a copy was supplied to Professors Clark and Burns by some officer of your company (handing document to witness)?

A. No; I am still not able to recognize that.

Q. Well, is it your testimony that you do not know, or that you say that it is not the information that was supplied by your company?

47426 Q. Do you recall, Mr. Moore, in your testimony on direct with regard to that exhibit, Commission's Exhibit 972-2-Q?

A. Well, I recall that you showed me another exhibit.

Q. I am talking about your direct testimony now.
A. Yes, and that is what I am talking about.
Q. Well, I didn't show you anything on direct.
A. Well, whenever it was you showed me another
47427 exhibit and asked me if that would help me to identify this exhibit, and it did not. It had a reverse effect.
Q. I never ask you to identify this exhibit before. I do ask you now, however, whether you can say any more with regard to Commission's Exhibit 972-2-Q than you did on cross-examination regarding other portions of the questionnaires, Clark and Burns questionnaires, for the Dewey Company?
47428 A. No, I cannot.

By Mr. Wooden:

Q. In other words, Commission's Exhibit 976-11-C to 11-P, Commission's Exhibit 976-11-Q to 4-A, Commission's Exhibit 976-11-Q to 12-K, Commission's Exhibit 976-3-G to 4-A—in other words, you have already answered that you could not say any more about Commission's Exhibit 976-2-Q than you could about those?
A. Well, no, I have not answered that yet.
Q. Well, that was my question.
A. I had not seen these latter exhibits yet, then.
Q. Well, I referred to them generally before I referred to them specifically, that is all. That is the only difference.
(The witness is looking at papers.)
A. Well, this is what I saw in this exhibit, is that 361?
Q. No, that is the number of the mill.
A. Oh.
Q. Not the questionnaire.
A. What is the exhibit number?
Q. It is down here.
A. 976?
Q. Here.
47429 A. Well, I have 976-3-U. It is answer to question 5. The question is: "Have you since January 1, 1925, operated your own ships or barges?" And the answer to that is: "Yes, barges in New York harbor." And we certainly never operated any barges in New York harbor.
Q. I see that Commission's Exhibit 976-3-V shows the location of a mill at Valley Junction, Iowa. You have no mill there, do you?

A. No, we do not.

Q. As a matter of fact, beginning with Commission's Exhibit 976-3-V, that is a mill—and running to
47430 Commission's Exhibit 976-4-A—that is mill No. 361, isn't it, Mr. Moore, and located at Valley Junction, Iowa, which is not your mill, that is true; isn't it?

A. Well, Valley Junction is not our mill, and it never shipped by barges in New York harbor, I am sure of that.

Q. You don't know what Valley Junction did, though, do you?

A. I am pretty sure of that. They are further west from New York than we are.

Q. Now, Commission's Exhibit 976-3-G to 3-T, inclusive, is mill No. 360, isn't it?

47431 A. Well, that is the identification number in the upper righthand corner of each one of those pages.

By Mr. Wooden:

Q. And that covered your mill at Davenport, Iowa, didn't it?

A. Well, I don't know. I don't know who put those numbers on, or what it is about. I do not know. Davenport is on the first page—it does not appear on any other pages that I have noticed.

Q. But the same number of the mill appears on the other pages?

A. Yes, that appears.

Q. And that was the number of your Davenport mill, wasn't it, in the Clark and Burns questionnaire?

A. Well, I do not know, Mr. Wooden. I do not remember numbers that were on the questionnaire or whether it was numbered when we received it, or not.

Q. Well, you can't say any more about Commission's Exhibit 972-2-Q, as to its authorship or authenticity
47432 than you were able to say about Commission's Exhibit 976-3-G to 3-T, inclusive, and Commission's Exhibit 976-11-C to 11-P, inclusive, and 976-11-T to 12-K, inclusive, is that correct?

A. I cannot add anything further.

Q. Can you say anything different than you have already said about these other exhibits?

A. No.

Q. Now, I am directing your attention to Commission's Exhibit 972-2-Y, which is in the record as a part of the questionnaire replies relating to your Dewey, Okla., mill.

Can you say anything more or anything different than you have already told us about these other exhibits that I have asked you about just now?

A. I cannot add anything to my previous testimony regarding the identification of that exhibit.

47433 *Redirect Examination by Mr. Seeley.*

Q. Mr. Moore, I show you Commission's Exhibit 976-3-G to 4-A, and I ask you if that exhibit represents the answers which you said you worked on in your office in answering the Clark and Burns questionnaire?

A. I don't think it is.

Q. Do I understand that they are or are not your answers?

A. They are not.

Mr. Seeley: Then I move, Your Honor, to strike this exhibit from the record.

Trial Examiner Norwood: Is that all of the evidence there is on the identification of those papers?

Mr. Wooden: No, it is not, Your Honor.

Trial Examiner Norwood: Motion denied.

47435 Q. Now, Mr. Moore, Mr. Wooden questioned you at record page 47311 concerning the delivery of cement by water from your Davenport, mill, and you said that you had obtained some idea as to what transportation costs by water were. What did you mean by "transportation costs by water"?

A. I meant the published costs of the Federal Barge Lines Company, tariffs filed with the Interstate Commerce Commission, and the switching tariffs of the railroads at the destinations where we were investigating deliv-
47436 eries or the possibilities of making deliveries, and our own cost of loading at the plant.

Q. You say "cost of loading," and you mentioned the transportation cost of these public carriers.

A. Yes, sir.

Q. Were there any other costs involved in these water deliveries, to your knowledge?

A. Well, yes. Of course, you have to equip yourself. If you are not going to use the public carriers you have to have your own barges and equipment, tow boats and facilities at destination for warehousing and things of that sort.

Q. When you say "facilities at destination," was there any cost or additional expense at destination?

47437 A. Yes; there would be switching charges in addition to the unloading costs and handling costs at destination; that is, switching charges from the unloading dock or warehouse at the river's side to the dealer's warehouse.

By Mr. Seeley:

Q. Well, has there ever been any place on the river, or has there ever been any dealer who has been able to take delivery at his warehouse?

A. No, sir; not by barge at the warehouse.

Q. You said at the same place in the record, in
47438 answer to Mr. Wooden's question, that you had given consideration to the establishment of silos at Minneapolis and St. Paul; is that correct?

A. Yes, sir.

Q. Did you ever build any silos there?

A. No, sir.

Q. Why not?

A. Because the cost is too great.

Q. What do you mean by "the cost"?

A. Well, it would have required an expenditure of about $375,000, that we do not care to make, because the business in sight was not enough to justify it, and, furthermore, we found that we could only operate on the river about six months out of each year, due to ice conditions.

Q. You say, do I understand, that your experience has been that barges can only operate six months a year from your plant?

A. Into Minneapolis and St. Paul, yes.

Q. Now, you answered in answer to a question by Mr. Wooden you said you had some idea as to what transportation costs by water were. Did you refer to costs of transportation of coal or cement?

A. Coal.

Q. Well, now, referring to this answer to Mr. Wooden concerning the cost of transportation by water, I want to know what has been your experience, what you have
47439 found with respect to the cost of transportation by water as compared with the cost of transportation by rail? I am speaking now of cement.

A. Well, our investigation as to what it would cost us to ship disclosed that when we consider our loading costs at the plant plus the Federal Barge Line rate from Davenport to Minneapolis, which was 80 percent of the all-rail

rate applying from Davenport to Minneapolis, plus the switching charges and dock unloading costs at Minneapolis, the total cost would be more than it would cost to ship the cement all rail.

47440 Q. Now, will you tell us, Mr. Moore, you said that your answer was based on your experience with the cost of transporting coal. Will you tell us whether or not the barges you use for transporting coal are used for any other purpose?

47441 A. Yes, sir; they are used. They are used for—they are under charter, and have been for several years, to a private towing contractor who uses them for transporting scrap iron and other commodities besides our coal.

Q. And did you or did you not take into consideration in answering Mr. Wooden's questions concerning costs on water transportation the fact that those barges were in use for other things as well as transporting coal?

A. Yes, I took into consideration the fact that those barges were earning $15 a day per diem each when they were not in use in our services.

Q. What did you find, if anything, as to whether cement barges, or, first, I will ask you, did you give any consideration to purchasing or constructing cement barges?

A. Well, yes. We have considered constructing or having constructed for us cement barges, but they cost a lot of money, they cost better than $20,000 a piece.

Q. And what did you find as to whether they were useful for any other purposes?

A. Well, we could not figure out any other use for them besides using them for cement if they were specially constructed for that purpose.

Trial Examiner Norwood: Could you use them for coal?

The Witness: No, sir. They would have to be a closed barge where the weather could not get in contact
47442 with the cement.

Trial Examiner Norwood: Could you use them for ore?

The Witness: Well, there is no ore movement up there, Your Honor.

By Mr. Seeley:

Q. Now, as a rate man, can you tell us with respect to this 80 percent rates you have mentioned of the public transportation carriers, as to how those rates are set?

A. Why, those—

Q. Whether or not they take into consideration these additional expenses that you told us about?

A. Well, the Federal Barge Lines rates are published as being 80 percent of the all-rail rate. As far as I know, that is exactly what it means, is the way it is published.

Q. Now, Mr. Wooden questioned you about your policy on diversions, Mr. Moore, policy toward diversions of your shipments. Mr. Wooden asked you whether diversions had any potentialities of affecting the delivered prices in the territory—in the invaded dealers' territory. Now, I want to know whether that was or was not, or is or is not a reason for your policy toward diversions, or what is the reason for your policy toward diversions?

47443 A. Well, that did not have anything to do with our policy toward diversions. In fact, I never thought of that until Mr. Wooden asked me a question.

47444 Q. Mr. Moore, with reference to this matter of the freight rate for minimum carloads which you told Mr. Wooden about and Mr. Wooden questioned you concerning the date of this situation in Kansas City, when the rate was based on 80,000 pound car, and you said that you were shipping from your mill against a rate based on a 50,000 pound car. I simply want to know when that first began and how long it has existed, that situation?

A. You mean how long has it been since we have had the 50,000 minimum into Kansas City, since August 8, 1918.

Q. And you have had it ever since then?

A. Yes, sir.

Q. Mr. Wooden questioned you concerning the policy of your competitors in February 1935, as to whether your company saw fit to adopt that policy. I show you Respondents' Exhibit, in evidence, 3641-A to H, with reference to 3641-B, and ask you whether that refreshes your memory as to what the February policy of your competitors that you testified about was, at least of

47445 the policy of the company which was brought to the attention of your company in connection with these papers from your sales force.

A. Well, it brings to my mind one thing that I had not thought of before, and that is that this policy of February, 1935, of the Universal-Atlas had a clause that stated that cement for work of federal relief agencies located entirely within cities, towns, and villages; will be sold through

dealers, leaving the inference that cement for those purposes, for delivery outside of cities, towns, and villages, would be sold direct. It had been our policy—

Q. Well, I will ask you what was your policy theretofore with respect to cement for such usages, outside of cities, towns, and villages?

A. Well, we were selling them through the dealer.

Q. And did you make any change subsequent to the date of this exhibit, February, 1935?

A. No, sir.

Q. I show you Commission's Exhibit 2386. Is that your policy of May, 1935, the announcement which you sent out?

A. Yes, sir.

Q. Did you make any changes in your policy there with respect to the sales of this type of work I have just referred to?

A. No, sir.

47446 *Recross Examination by Mr. Wooden.*

Q. Mr. Moore, Mr. Seeley asked you whether Commission's Exhibits 976-3-G to 4-A were the questionnaire replies of the Dewey Company's mill at Dewey, and you said you did not believe it was. That is correct, is it not?

A. Yes, sir.

Q. And he included in that question this Exhibit 976-3-B to 4-A, which includes the Valley Junction mill No. 361, which we agreed a while ago was not your mill.

Q. Is not that correct?

A. That included 976-4-A. That is the way I understood it.

By Mr. Wooden:

Q. Yes.

A. Yes, sir.

Q. Is your answer any different to the same question about applying to Commission's Exhibit 976-3-G to 3-T, inclusive?

47447 Q. (Continuing) Covering mill 360, than it was when I asked you on Friday about that?

Q. (Continuing) And you said you could not tell.—

Q. (Continuing)—whether it was your mill or not?

A. As I recall what I said last Friday, it is that I was convinced that it was not ours.

By Mr. Wooden:

Q. Well, the record will show.

A. Yes.

Q. You now say you said you could not tell. Is that your understanding?

A. After you showed me those exhibits last Friday, and I found that answer that I read, that I was convinced that that was not our report.

By Mr. Wooden:

Q. You are now changing your testimony?—

A. No.

Q. —to that extent?

47448 A. No, I am not. I thought I testified last Friday, after you showed me the exhibit, I was positive it is not our report, and that is what caused me to be so positive.

Q. You are now convinced that Commission's Exhibit 976-3-G to 3-T is not a copy of a report that was submitted by your company in answer to the Clark and Burns questionnaire?

A. I sure don't think it is.

Q. You are convinced that it is not?

A. In my own mind; yes.

Q. And what is the basis of your present conviction?

A. Well, the basis of it is that, in the first place, it didn't look like, and I have never been able to identify it in my own mind with the questionnaire that was submitted to us by Clark and Burns that we filled out, and then, on top of that, are the answers to the questionnaire which I knew could not be related to our Davenport mill.

By Mr. Wooden:

Q. For instance, what?

A. Well, in this—you removed a part of this now. You have removed the—

A. (Continuing)—the attachments.

47449 Mr. Wooden: Yes, I removed No. 361, the Valley Junction mill.

Q. For instance what? Now, repeat your answer that you gave about the fact that the Valley Junction mill questionnaire is not now attached to those papers.

A. Let me have that again, please.

Trial Examiner Norwood: Read it.

(Question read.)

The Witness: Are there two questions there? I don't understand.

Trial Examiner Norwood: Counsel had better clarify the whole situation.

By Mr. Wooden:

Q. Well, I ask you to tell us what underlies your present conviction that Commission's Exhibit 976-3-G to 3-T, inclusive, are not the report made by your company
47450 to the Clark and Burns questionnaire?

Mr. Seeley: I want to know, Your Honor, whether this exhibit now being shown to the witness is 3-G to 3-T, inclusive, or whether pages have been taken out.

Trial Examiner Norwood: Counsel may examine it, if he wants to.

Go ahead.

By Mr. Wooden:

Q. What is your answer, Mr. Moore?

The Witness: Now, I would like the question again, please.

Trial Examiner Norwood: Read it.

(Question read.)

A. Well, to begin with, there are writings on this exhibit that I do not recognize—the handwriting.

By Mr. Wooden:

Q. Now, will you explain—

Trial Examiner Norwood: Let him finish, please.

Mr. Wooden: Those writings are not in evidence.

Trial Examiner Norwood: Go ahead.

A. The answers in many cases are typewritten, while the copy of the questionnaire that we sent to Messrs. Clark and Burns, that I recall seeing not many months ago in our Kansas City office, had a great many of the answers in
the handwriting of either Mr. F. E. Tyler, president,
47451 of our company, or Mr. M. B. Ward, our general auditor. Those are the things that cause me to thinks that this is not the questionnaire that we sent to Clark and Burns.

By Mr. Wooden:

Q. Well, did you not also say a few minutes ago that one reason you thought it was not was because Commission's Exhibit 976-3-B to 4-A had been attached to that, and that was the Valley Junction mill of another company?

A. Yes. That also influenced me on Friday when I made my final answer to you.

Q. The office copy, as I understand it, of your questionnaire reports to Professors Clark and Burns,—some of those answers are in handwriting rather than in typewriting; is that right?

A. Yes, sir.

Q. But you do not know whether the answers are the same or not; do you?

A. No; I would have to compare the two documents.

Q. In other words, the answers may have been written in in handwriting and yet be the same as those sent in in typewritten form; is not that right?

A. Oh, of course, that could be.

Q. Well, I asked you on Friday if you could produce the duplicate copy that you kept when you made those reports.

47456 Q. Did you not tell me on cross-examination on Friday, Mr. Moore, that you had good reason to know what the transportation rates on cement were, as well as on coal?

A. When?

Q. On Friday.

A. What period are you talking about transportation rates, and where?

Q. On transportation rates by water on the river past your mill at Davenport.

A. As related to our business at Davenport?

Q. No; comparison between cement rates and coal rates. You said you had good reason to know what the cement transportation rates were; did you not?

A. Yes; based on Interstate Commerce Commission decisions prior to our coming here.

Q. On these Federal Barge Lines, the barges may carry all sorts of products—coal, cement, or anything else that is offered?

A. No; not on the same barge.

Q. No; but—

A. Different barges.

Q. In barges, nevertheless.

A. Different barges for different commodities.

Q. Is it not a fact that some dealers could haul from the dock to the job if you shipped it by water?

A. Well, they would have to have the equipment,
47457 and there are no dealers up there that have the equipment to haul it.

Q. No dealers that have trucks?

A. I thought you were talking about the dock and water shipments.

Q. Only from the dock by truck to the job.

A. Do you mean from the dock where we load the barges?

Q. No; where they unload the barges—the dock where it is delivered.

A. We have never shipped any by barge, and I just doubt that we could do that economically, if it is a very big job, by trucking.

Q. Is it any more uneconomical to haul from the dock to the job by truck than it is to haul from the railroad siding by truck?

A. That is a different situation. When you transfer cement from barges for delivery at the terminal, you generally get a switching charge of a low figure in dollars and cents per car, and I do not think you could truck in competition with those switching charges for a high volume tonnage per car. You can load 300 barrels in a car and switch it on a per-car rate, where you could not begin to touch that switching charge in competition with trucks.

Q. Within the switching limits.

A. That is where the deliveries would be—within the switching limits.

47458 Q. Do not dealers take cement for delivery to the job outside of the switching limits?

A. Well, not in my experience they have not done that.

Q. Don't they do that up and down the river?

A. Not in my experience.

47460 Washington, D. C.,
Tuesday, October 29, 1940.

47461 ERNEST O. LOTHROP, called as a witness for the Respondents, first being duly sworn, testified as follows:

Direct Examination by Mr. Bond.

I am Ernest O. Lothrop, and I am a certified public accountant. I have been a certified public accountant
47462 for 20 years. I am certified in a number of States, approximately 8.

I am connected with the firm of Price, Waterhouse & Company. I am a partner in that firm. I have been connected with the firm upwards of 25 years. I am a member of the American Institute of Accountancy and the State Societies. I attend their meetings from time to time. I am familiar with the literature on accountancy problems.

47462 Mr. Bond: I tender the witness as a duly qualified expert in the field of accountancy.

Mr. Wooden: No objection to accepting him as such in that field.

Trial Examiner Norwood: He is received as such.

Mr. Bond: Now, I think I ought to state to Your Honor in view of the fact that you have ruled on various
47463 occasions that testimony as to costs and profits were not admissible in the case, that our purpose in calling this witness was to prove the profits of this industry and to show that the firm, of which he is a partner, has made an investigation, he, himself, having been in personal charge of it, and we are prepared to show what the investment and the profits are.

Mr. Wooden: If Mr. Bond's statement is intended to be an offer of proof it seems to me it should be much more definite and specific than it is.

Mr. Bond: No, it is not an offer.

Mr. Wooden: But if it is ever an approach to an offer of proof regarding the subject of costs and profits in the cement industry, I renew and repeat and emphasize objections heretofore made that all such evidence is irrelevant and immaterial on the issue of whether or not Respondents

have combined to eliminate price competition in the industry, and, as I have said before, I shall make that point and insist upon that point to the extent of an appeal to the Commission, if necessary.

47464 Trial Examiner Norwood: Now, as heretofore stated, I consider that this is irrelevant, that there is no issue here of what costs and profits are, but I can conceive of it being of a great deal of importance to the Commission hereafter in case they find there is sufficient here to justify their taking any action whatsoever in respect to this industry, but that is not our business, that is not my business here. We are to bring out the facts on these issues that are raised by these pleadings, consequently I shall not receive this evidence. You may consider your statement as an offer of proof or add to it anything you wish to. If the Commission wishes this information they can call it later. If you have it in the shape of a survey and in documentary form, why, it might be called for, I can't say.

Mr. Bond: Well, in view of the importance of the matter as Your Honor, I know, recognizes from our point of view, may I state very briefly our purpose in offering this line of testimony?

Our purpose in offering this is to rebut any inference which might be drawn from any of the evidence introduced by the Federal Trade Commission to the effect that there is a combination or conspiracy in restraint of trade.

47467 The Commission's Counsel has not proved the alleged combination by direct evidence but has attempted to prove it by means of inferences which they contend should be drawn from the evidence which they offered. The proof we are now offering shows that there were no normally large profits in this industry; that there are wide differences among average profits made by the various companies, and that the profits of each relative to its competitors varies from year to year. Such proof combined with our other evidence negatives any inference that there was during eight years last past a combination in restraint of trade, and it further negatives any evidence offered by the Commission relative to alleged high base prices in paragraph 8(b), the alleged nullification of the influence of cost upon price in paragraph 8(c), the alleged artificiality of the price level in paragraph 8(d), and the alleged disappearance of prices arrived at through free competitive forces in paragraph 9, subnumber (1).

Now, we contend, if Your Honor please, that the evidence as to profits is relevant and material to the issues raised by the complaint, and particularly to those I have enumerated.

With reference to all these matters I can point out that there is no direct evidence of the existence of the conspiracy. The proof has consisted throughout of circumstantial evidence from which the Commission's
47466 Counsel seeks to draw inferences to the effect that a combination in restraint of trade has existed, and we feel that in view of the pleadings and proof evidence as to profits and losses is admissible for the purpose of negativing the inference that a combination did, in fact, exist.

In this case there is no admission or direct proof of the existence of an agreement or combination in restraint of trade, and in this respect the current proceeding is different from the facts presented to the courts in the Trenton Potteries and Standard Oil cases. We are not offering this material for the purpose of proving that an agreement,—which was proved by direct evidence, or which was admitted,—fixed or established prices at a reasonable level. Our sole purpose in offering this material is to negative any inference that such an agreement existed.

In this connection we would like to call Your Honor's attention to the fact that evidence as to profits was admitted by the trial court in the case of *United States* v. *Sugar Institute*, 297 U. S. 553. This evidence was introduced in the trial court in order to prove the nonexistence of a restraint upon competition. There was present in that case more compelling evidence from which the court felt it should infer that there had been a restraint of
47467 trade, but the court indicated that had this other evidence been lacking or less forceful it would have relied on the evidence as to profits in arriving at a decision that a combination in restraint of trade did not exist.

Your Honor also undoubtedly recalls what we have referred to as the Old Cement case, *Cement Manufacturers Protective Association* v. *United States* (268 U. S. 588). Evidence as to earnings and profits was admitted by the trial court, and the Supreme Court commented upon this evidence in its opinion, page 605, as follows:

"They, the defendants, offered much evidence tending to show complete independence of judgment and of action of

defendants by large expenditures in competitive sales efforts and by variations in the volume of their production and shipment, earnings and profits."

And in concluding his opinion, Justice Stone referred again as to the earnings and profits in discussing the effect of certain activities such as rate books, of specific job contract reporting and statistics, which are also in issue here, stating that the record "fails to show any effect on price and production except such as would naturally flow from the dissemination of that information in the trade and its natural influence upon individual action." Page 606.

The law is clear that every allegation of restraint
47468 of competition implies that abnormally high profits result. One of the facts, therefore, which would have a bearing upon the question of whether a conspiracy exists is the level of profits, i. e., whether profits are abnormally high or at a reasonable and low level, and whether they do or do not reflect an independence of action and judgment on the part of the respective Respondents. Hence, in any case where restraint of competition in price is charged, the absence of a large rate of return would be some evidence of the absence of the restraint charged.

Your Honor recalls that the economists in this case have testified that evidence as to profits and the rate of return is an important factor on the question of the existence or non-existence of competition. They have testified that in examining the cement industry to determine whether competition exists, a moderate rate of return is one of the symptoms or indicia which they would look for as indicating the presence of competition among the manufacturers.

Now, if Your Honor please, in summarizing our contention as to the relevancy and materiality of this evidence, we would like to point out that if the purpose of the anti-trust law is, as is assumed, namely, to protect the existence of free and effective competition in industry, then anything which would tend to establish the existence of
47469 free and effective competition is relevant and material to the issues in this case. The courts have long recognized that the result of free and effective competition is in the long run to bring prices into line with total costs, which includes a moderate profit on a total investment, and to bring about a constant effort to reduce the cost of manufacture or increase the quality of the product. Your

Honor well knows that we have introduced substantial evidence showing modernization of plants and improvement of products, and these facts have been conceded by counsel for the Commission. We are now asking for an opportunity to introduce evidence demonstrating the existence of the other result which one expects to find under a condition of free and effective competition, in order to prove by circumstantial evidence that the results which one expects to find from the existence of free and effective competition do exist in the cement industry.

Counsel for the Commission have admitted that some competition does exist in the cement industry but they have denied that it was effective in the field involving price. Our proof would show that it has been effective.

And, finally, the question of public interest is a vital one in this case. We submit that this testimony bears directly on the question of public interest since if the profits are low prices cannot be said to be exorbi-
47470 tant.

Trial Examiner Norwood: Well, I had in mind that the interest is peculiarly one for the Commission to deal with, and if it wants this information it can call for it. We have taken so long with this case now.

Mr. Wooden: Your Honor, may I say a word in reply to the statement of Mr. Bond?

Trial Examiner Norwood: Were you through?

Mr. Bond: I was going to make my offer of proof.

Mr. Wooden: Well, you made your argument first. Go ahead.

Trial Examiner Norwood: Go ahead.

Mr. Wooden: Just so I get a change to reply.

Mr. Bond: I offer to prove that the firm of Price, Waterhouse & Company has ascertained through an examination of the records of fifty cement companies the amount of net investments in domestic cement operations of the individual companies and the net earnings from such investments for each of the years 1928 to 1937, inclusive:

The list of companies included is as follows:

Aetna Portland Cement Company, Detroit, Mich.

Alpha Portland Cement Company, Easton, Pa.

Beaver Portland Cement Company, Portland, Ore.

Bessemer Limestone & Cement Company, Youngstown, Ohio.

47471 Calaveras Cement Company, San Francisco, Calif.

Castalia Portland Cement Company, Pittsburgh, Pa.

Consolidated Cement Corporation, Chicago, Ill.

Coplay Cement Manufacturing Company, Coplay, Pa.

Cumberland Portland Cement Company, Cowan, Tenn.

Dewey Portland Cement Company, Kansas City, Mo.

Diamond Portland Cement Company, Middle Branch, Ohio.

Edison Cement Corporation, New York, N. Y.

Federal Portland Cement Company, Inc., Buffalo, N. Y.

Florida Portland Cement Company, Chicago, Ill.

Georgia Cement & Products Company, Atlanta, Ga.

Giant Portland Cement Company, Philadelphia, Pa.

Glens Falls Portland Cement Company, Glens Falls, N. Y.

Great Lakes Portland Cement Corporation, Buffalo, N. Y.

Hawkeye Portland Cement Company, Des Moines, Iowa.

Hercules Cement Corporation, Philadelphia, Pa.

Hermitage Portland Cement Company, Nashville, Tenn.

Keystone Portland Cement Company, Philadelphia, Pa.

Kosmos Portland Cement Company, Louisville, Ky.

Lawrence Portland Cement Company, New York, N. Y.

Lehigh Portland Cement Company, Allentown, Pa.

Lone Star Cement Corporation, New York, N. Y.

Medusa Portland Cement Company, Cleveland, Ohio.

47472 Missouri Portland Cement Company, St. Louis, Mo.

Monarch Cement Company, Humbolt, Kansas.

Monolith Portland Cement Company, Los Angeles, Calif.

Monolith Portland Midwest Company, Los Angeles Calif.

National Cement Company, Birmingham, Ala.

Nazareth Cement Company, Nazareth, Pa.

North American Cement Corporation, Albany, N. Y.

Northwestern States Portland Cement Company, Mason City, Iowa.

Peerless Cement Corporation, Detroit, Mich.

Pennsylvania-Dixie Cement Corporation, New York, N. Y.

Petoskey Portland Cement Company, Petoskey, Mich.

Signal Mountain Portland Cement Company, Chicago, Ill.

Southern States Portland Cement Company, Rockmart, Ga.

Southwestern Portland Cement Company, El Paso, Tex.

Spokane Portland Cement Company, Spokane, Wash.

Standard Portland Cement Company, Cleveland, Ohio.

Superior Cement Corporation, Portsmouth, Ohio.

Trinity Portland Cement Company, Chicago, Ill.

Universal Atlas Cement Company, Chicago, Ill.

Volunteer Portland Cement Company, Knoxville, Tenn.

Vulcanite Portland Cement Company, Philadelphia, Pa.

West Penn Cement Company, Butler, Pa.

Wolverine Portland Cement Company, Coldwater, Mich.

47473 That these 50 companies own and operate 121 mills or approximately 80 percent of the mill capacity of the mills operated by all the Respondents in this proceeding; that the average rate of return upon investment in domestic cement operations of the said 50 companies listed for the said 10-year period from 1928 to 1937, inclusive, was after deduction of federal incomes taxes 2.99 percent on the average net investment; that the average rate of return for said period before deduction of federal incomes taxes was 3.56 percent on the average net investment.

I further offer to prove that said rate of return for the respective years after federal income taxes was as follows:

1928	Profit	10.24	Percent
1929	"	7.23	"
1930	"	6.88	"
1931	Loss	3.14	"
1932	"	5.60	"
1933	"	1.55	"
1934	Profit	2.58	"
1935	"	0.39	"
1936	"	6.90	"
1937	"	4.73	"

and that before deduction of federal income taxes said return was as follows:

47474	1928	Profit	11.43 Percent
	1929	"	7.98 "
	1930	"	7.68 "
	1931	Loss	3.01 "
	1932	"	5.59 "
	1933	"	1.49 "
	1934	Profit	2.95 "
	1935	"	0.58 "
	1936	"	8.14 "
	1937	"	5.67 "

I further offer to prove that the investment in domestic cement manufacturing facilities of said fifty companies for the said ten-year period from 1928 to 1937, inclusive, averaged $182,001,239, and that said investment on December 31, 1937, was $137,213,236.

I further offer to prove that the value of properties and equipment used have been the values recognized in each of said years by the United States Treasury Department for federal income tax purposes so far as the basic values thereof for tax purposes have been established by the Treasury and that the remaining assets were taken at net book values less any appreciation.

I further offer to prove that the net income of each company for each of said years was ascertained from the federal income tax returns of said companies as
47475 adjusted by subsequent audits of the Treasury Department.

I further offer to prove that such survey was made conservatively, all doubtful items being resolved upon a basis which would tend to increase the rate of return upon investment.

I further offer to prove as a further result of said examination that it was ascertained that the five so-called chain companies, namely, Universal Atlas, Lone Star, Lehigh, Alpha and Penn Dixie show an average rate of return upon investment for the said ten-year period, after deduction of federal income taxes, of 2.75 percent and an average rate of return, before deducting federal income taxes, of 3.28 percent.

I further offer to prove that the rate of return for said

five so-called chain companies for each of said years was after deduction of federal incomes taxes as follows:

	1928	Profit	10.01	Percent
	1929	"	6.46	"
	1930	"	6.44	"
	1931	Loss	2.28	"
	1932	"	5.52	"
	1933	"	1.82	"
	1934	Profit	1.82	"
	1935	Loss	0.54	"
47476	1936	Profit	6.34	Percent
	1937	"	4.13	"

and that before deduction of federal income taxes the return was as follows:

1928	Profit	11.16	Percent
1929	"	7.09	"
1930	"	7.21	"
1931	Loss	2.08	"
1932	"	5.52	"
1933	"	1.80	"
1934	Profit	2.09	"
1935	Loss	0.46	"
1936	Profit	7.60	"
1937	"	4.92	"

I further offer to prove that for the remaining 45 companies other than said five so-called chain companies the rate of return upon investment, after deducting federal income taxes, was 3.24 percent and the average rate of return of said companies before deducting federal income taxes was 3.86 percent.

I further offer to prove that the rate of return on the said 45 companies other than the said five so-called chain companies was after the deduction of federal income taxes as follows:

	1928	Profit	10.47	Percent
47477	1929	"	8.17	"
	1930	"	7.34	"
	1931	Loss	4.03	"
	1932	"	5.68	"
	1933	"	1.29	"
	1934	Profit	3.34	"
	1935	"	1.28	"
	1936	"	7.41	"
	1937	"	5.27	"

and before deduction of federal income taxes the rate of return was as follows:

1928	Profit	11.75 Percent
1929	"	9.06 "
1930	"	8.16 "
1931	Loss	3.08 "
1932	"	5.67 "
1933	"	1.17 "
1934	Profit	3.82 "
1935	"	1.58 "
1936	"	8.63 "
1937	"	6.35 "

I further offer to prove that said survey shows that after deduction of federal income taxes 12 companies showed a net loss for said ten-year period, two of said companies having losses of 4.42 percent and 8.97 4747S percent respectively; that two other companies earned less than 1 percent for said period; that eight other companies had profits of between 1 and 2 per cent for said; that seven other companies had profits between 2 and 3 percent for said period; that six other companies had profits of between 3 and 4 percent of said period; that six other companies had profits of between 4 and 7 percent for said period; that six other companies had profits of between 7 and 10 percent for said period and that three companies earned in excess of 10 percent for said period, the highest being 12.46 percent.

I further offer to prove that after deduction of federal income taxes said survey shows the earnings of one company for said period to have been as follows:

1928	Loss	1.23 Percent
1929	"	.32 "
1930	Profit	10.43 "
1931	Loss	3.49 "
1932	"	2.44 "
1933	Profit	2.90 "
1934	"	7.09 "
1935	"	5.72 "
1936	"	8.99 "
1937	"	10.42 "

or an average profit for said period of 3.70 percent.

47479 That another company for said period showed the following:

1928	Profit	8.50	Percent
1929	"	5.36	"
1930	"	4.12	"
1931	Loss	.07	"
1932	"	4.34	"
1933	"	1.27	"
1934	Profit	2.31	"
1935	Loss	4.34	"
1936	Profit	5.94	"
1937	"	2.45	"

or an average profit for said period of 2.04 per cent.

That another company for said period showed the following:

1928	Loss	2.08	Percent
1929	"	.12	"
1930	Profit	4.25	"
1931	"	2.69	"
1932	"	.78	"
1933	"	2.46	"
1934	"	6.61	"
1935	"	.45	"
1936	"	3.67	"
1937	"	3.26	"

47480 or an average profit of 2.15 percent.

That another company for said period showed the following:

1928	Profit	6.27	Percent
1929	"	2.61	"
1930	"	5.12	"
1931	"	2.98	"
1932	Loss	2.43	"
1933	Profit	.26	"
1934	"	2.82	"
1935	"	1.68	"
1936	"	3.32	"
1937	"	4.56	"

or an average profit of 2.67 percent.

That another company for said period showed the following:

1928	Profit	4.93	Percent
1929	"	5.36	"
1930	"	5.33	"
1931	Loss	8.28	"
1932	"	11.45	"
1933	"	2.49	"
1934	Profit	.39	"
1935	"	.69	"
1936	"	5.33	"
1937	"	5.99	"

47481 or an average profit of .42 percent.

That another company for said period showed the following:

1928	Profit	5.93	Percent
1929	"	7.91	
1930	"	8.56	
1931	"	2.64	
1932	Loss	12.77	
1933	"	7.55	
1934	"	5.98	
1935	"	1.20	
1936	"	6.77	
1937	Profit	1.07	

or an average loss of .40 percent.

That another company for said period showed the following:

1928	Profit	8.71	Percent
1929	"	4.41	
1930	"	2.33	
1931	Loss	10.98	
1932	"	5.05	
1933	Profit	.67	
1934	"	3.87	
1935	"	2.85	
47482 1936	"	4.97	
1937	Loss	1.55	

or an average profit of 1.22 percent.

That another company for said period showed the following:

1928	Profit	12.59 Percent
1929	"	8.80
1930	Loss	5.03
1931	"	36.71
1932	"	28.13
1933	"	13.06
1934	Profit	15.34
1935	Loss	4.52
1936	Profit	5.07
1937	"	7.04

or an average loss of 1.95 percent.

That another company for said period showed the following:

1928	Profit	6.87 Percent
1929	Loss	5.65
1930	"	3.06
1931	"	9.36
1932	"	20.99
1933	"	9.20
1934	Profit	1.47
47483 1935	Loss	1.58
1936	Profit	.82
1937	Loss	5.82

or an average loss of 4.42 percent.

That another company for said period showed the following:

1928	Profit	1.97 Percent
1929	Loss	4.35
1930	"	2.32
1931	"	7.85
1932	"	9.19
1933	"	3.55
1934	Profit	1.79
1935	"	.71
1936	"	1.35
1937	Loss	1.97

or an average loss of 2.50 percent.

That another company for said period showed the following:

	1928	Profit	4.32 Percent
	1929	"	4.61
	1930	"	3.54
	1931	Loss	13.83
	1932	"	11.60
	1933	"	8.21
47484	1934	"	1.31
	1935	"	2.63
	1936	Profit	4.14
	1937	"	1.77

or an average loss of 1.36 percent.

That another company for said period showed the following:

	1928	Loss	12.05 Percent
	1929	"	12.13
	1930	"	4.37
	1931	"	2.75
	1932	"	8.47
	1933	"	.47
	1934	Profit	2.05
	1935	"	5.57
	1936	"	7.96
	1937	"	5.93

or an average loss of 1.57 percent.

That another company for said period showed the following:

	1928	Profit	8.27 Percent
	1929	"	4.38
	1930	"	7.70
	1931	Loss	18.97
	1932	"	10.63
47485	1933	"	6.78
	1934	"	1.63
	1935	Profit	2.18
	1936	"	4.40
	1937	"	2.12

or an average loss of .82 percent.

That another company for said period showed the following:

1928	Profit	7.31 Percent
1929	"	3.55
1930	"	4.56
1931	Loss	7.71
1932	"	11.10
1933	"	6.61
1934	"	7.15
1935	Profit	.35
1936	"	1.51
1937	"	2.53

or an average loss of .92 percent.

That another company for said period showed the following:

1928	Profit	4.33 Percent
1929	"	6.79
1930	"	2.62
1931	Loss	13.80
47486 1932	"	10.32
1933	"	2.35
1934	Profit	.39
1935	Loss	.20
1936	Profit	1.26
1937	"	1.05

or an average loss of .84 percent.

That another company for said period showed the following:

1928	Profit	2.98 Percent
1929	"	5.75
1930	"	4.09
1931	Loss	.72
1932	"	4.31
1933	"	4.35
1934	Profit	.93
1935	Loss	2.70
1936	Profit	.46
1937	Loss	3.90

or an average profit of .19 percent.

That another company for said period showed the following:

	1928	Profit	4.48 Percent
	1929	"	3.76
	1930	"	2.97
47487	1931	"	1.64
	1932	Loss	2.13
	1933	"	.45
	1934	"	.67
	1935	Profit	3.26
	1936	"	3.63
	1937	"	1.58

or an average profit of 1.92 percent.

That another company for said period showed the following:

	1928	Profit	10.08 Percent
	1929	"	6.70
	1930	"	4.70
	1931	Loss	3.47
	1932	"	6.73
	1933	"	2.81
	1934	"	.67
	1935	"	.54
	1936	Profit	6.17
	1937	"	1.38

or an average profit of 1.63 percent.

That another company for said period showed the following:

	1928	Profit	8.00 Percent
	1929	"	6.91
47488	1930	"	8.78
	1931	Loss	.56
	1932	"	1.21
	1933	"	.30
	1934	Profit	1.70
	1935	Loss	3.37
	1936	Profit	.68
	1937	Loss	4.67

or an average profit of 1.92 percent.

That another company for said period showed th lowing:

1928	Profit	.16	Percent
1929	Loss	2.07	
1930	"	1.48	
1931	"	1.04	
1932	"	5.22	
1933	"	1.04	
1934	Profit	8.70	
1935	"	5.82	
1936	"	9.86	
1937	"	9.50	

or an average profit of 1.77 percent.

That another company for said period showed th lowing:

1928	Profit	8.40	Percent
1929	"	6.22	
1930	"	7.71	
1931	Loss	4.51	
1932	"	5.58	
1933	"	.55	
1934	Profit	1.13	
1935	Loss	.93	
1936	Profit	4.37	
1937	"	2.00	

or an average profit of 2.00 percent.

That another company for said period showed th lowing:

1928	Profit	6.43	Percent
1929	"	4.62	
1930	"	7.44	
1931	Loss	3.90	
1932	"	8.78	
1933	"	2.59	
1934	Profit	1.26	
1935	"	.59	
1936	"	8.17	
1937	"	6.17	

or an average profit of 1.84 percent.

That another company for said period showed the following:

47490	1928	Profit	12.00 Percent
	1929	"	5.45
	1930	"	6.90
	1931	Loss	1.54
	1932	"	6.43
	1933	"	3.57
	1934	Profit	2.71
	1935	"	2.18
	1936	"	7.57
	1937	"	3.73

or an average profit of 2.98 percent.

That another company for said period showed the following:

1928	Profit	8.77 Percent
1929	"	13.86
1930	"	13.01
1931	Loss	2.34
1932	"	6.31
1933	"	.41
1934	Profit	1.84
1935	Loss	4.91
1936	Profit	2.78
1937	Loss	.31

or an average profit of 2.81 percent.

That another company for said period showed the

47491 following:

1928	Profit	19.53 Percent
1929	"	16.78
1930	"	7.46
1931	Loss	6.37
1932	"	6.82
1933	"	3.64
193[illegible]	Profit	3.22
1935	"	.15
1936	"	7.77
1937	"	4.11

or an average profit of 3.29 percent.

That another company for said period showed the lowing:

1928	Profit	7.44 Percent
1929	"	8.16
1930	"	5.49
1931	Loss	4.25
1932	"	5.69
1933	Profit	.56
1934	"	5.76
1935	"	2.75
1936	"	9.80
1937	"	4.42

or an average profit of 3.48 percent.

47492 That another company for said period showed following:

1928	Profit	16.48 Percent
1929	"	14.47
1930	"	8.46
1931	Loss	15.14
1932	"	12.91
1933	"	2.78
1934	Profit	1.84
1935	"	2.86
1936	"	9.27
1937	"	4.32

or an average profit of 3.14 percent.

That another company for said period showed the lowing:

1928	Profit	11.52 Percent
1929	"	7.63
1930	"	10.79
1931	Loss	6.43
1932	"	12.90
1933	"	1.61
1934	Profit	6.04
1935	"	.99
1936	"	13.98
1937	"	8.35

47493 or an average profit of 3.93 percent.

That another company for said period showed the following:

1928	Profit	12.06 Percent.
1929	"	9.29
1930	"	10.76
1931	Loss.	8.32
1932	"	8.18
1933	"	2.08
1934	Profit	1.60
1935	"	.92
1936	"	9.23
1937	"	7.76

or an average profit of 4.08 percent.

That another company for said period showed the following:

1928	Profit	15.36 Percent
1929	"	11.79
1930	"	6.05
1931	Loss	3.35
1932	Profit	2.14
1933	Loss	.40
1934	Profit	4.65
1935	Loss	3.52
1936	Profit	6.17
1937	"	6.09

or an average profit of 4.94 percent.

That another company for said period showed the following:

1928	Profit	12.54
1929	"	10.99
1930	"	12.95
1931	"	4.33
1932	Loss	3.18
1933	"	1.86
1934	"	1.31
1935	"	1.42
1936	Profit.	4.65
1937	"	11.09

or an average profit of 5.09 percent.

That another company for said period showed the following:

	1928	Profit	3.52
	1929	"	8.21
	1930	"	3.24
	1931	Loss	7.75
	1932	"	6.23
	1933	"	1.51
	1934	Profit	9.19
	1935	"	13.26
47495	1936	"	16.74
	1937	"	18.81

or an average profit of 3.45 percent.

That another company for said period showed the following:

	1928	Profit	27.70
	1929	"	19.28
	1930	"	3.11
	1931	"	1.06
	1932	Loss	2.41
	1933	"	1.49
	1934	Profit	.45
	1935	"	3.34
	1936	"	11.85
	1937	"	5.77

or an average profit of 7.07 percent.

That another company for said period showed the following:

	1928	Profit	.35
	1929	"	7.65
	1930	"	9.84
	1931	"	7.26
	1932	Loss	.02
	1933	Profit	1.88
	1934	"	12.91
47496	1935	"	17.89
	1936	"	12.47
	1937	"	11.57

or an average profit of 8.20 percent.

That another company for said period showed the following:

1928	Profit	23.66
1929	"	16.37
1930	"	15.51
1931	Loss	10.82
1932	"	4.91
1933	"	6.97
1934	Profit	4.19
1935	"	3.67
1936	"	18.89
1937	"	11.61

or an average profit of 8.10 percent.

That another company for said period showed the following:

1928	Profit	20.76
1929	"	11.32
1930	"	14.70
1931	Loss	1.55
1932	Profit	2.19
1933	"	3.64
47497 1934	"	9.16
1935	"	7.66
1936	"	14.56
1937	"	14.90

or an average profit of 9.49 percent.

That another company for said period showed the following:

1928	Profit	21.70
1929	"	27.09
1930	"	19.00
1931	Loss	.50
1932	"	2.02
1933	Profit	2.07
1934	Loss	1.65
1935	Profit	6.81
1936	"	14.49
1937	"	15.61

or an average profit of 10.02 percent.

That another company for said period showed the following:

	1928	Profit	27.65
	1929	"	25.98
	1930	"	22.54
	1931	"	1.11
	1932	Loss	.51
47498	1933	Profit	5.59
	1934	"	12.66
	1935	"	9.23
	1936	"	15.46
	1937	"	10.04

or an average profit of 12.45 percent.

That another company for said period showed the following:

	1928	Profit	25.32
	1929	"	14.81
	1930	"	4.84
	1931	"	2.43
	1932	Loss	4.75
	1933	Profit	17.82
	1934	"	14.65
	1935	"	8.14
	1936	"	21.44
	1937	"	18.38

or an average profit of 12.46 percent.

I further offer to prove that the source and the only source which Price, Waterhouse & Company used in making said survey was the original books and records and annual tax returns of the respective companies.

I offer to make all of said books and records available to Counsel for the Commission in the event that
47499 said evidence is received.

I further offer to call for cross-examination any of the employees of Price, Waterhouse & Company who did the detailed work in the offices of the various companies under the supervision of Mr. Lothrop and upon which work the survey was based.

I further offer to prove that for said ten-year period, from 1928 to 1937, inclusive, the average Treasury interest rate upon all United States Government interest-bearing obligations was 3.31 per cent for said period.

Mr. Wooden: If Your Honor please, I cannot, of
47500 course, undertake in an impromptu oral statement to meet all the erroneous statements which I noted as Mr. Bond was making his argument and offer of proof, but while emphasizing again my contention that evidence regarding profits and costs is irrelevant and immaterial on the issue of the existence of a combination, for the moment I want to address myself just to this point, and I make the assertion on my own responsibility that this motion, and move of Respondents, on this issue is just another attempt to string out this case indefinitely.

Mr. Leisure: May I ask what this argument is addressed to? Your Honor, has already ruled, but what is the argument? I rise to a point of order. What is this argument addressed to?

Trial Examiner Norwood: He is stating his objections to this proffer.

Mr. Leisure: But Your Honor has already ruled.

Mr. Wooden: Argument has been made.

Mr. Leisure: I object to Mr. Wooden arguing his case at this time.

Mr. Wooden: I object to Mr. Bond arguing his.

Trial Examiner Norwood: You have had practically three-quarters of an hour here. I think Counsel on the other side may state his side of the controversy. I do not see how you can even state an objection to that.

47501 Go ahead.

Mr. Wooden: And I say further in that connection, Your Honor, that to cross-examine the witnesses produced in support of this survey, cross-examination alone would take months and months to go behind those figures, and on rebuttal it would take other months, and yet we are prepared—that is, we know that we could rebut it, because we know that if you take a longer period of time such as 20 years, including this same period that they have got, you will get a wholly different showing, and we could do it, but even we would not contend that if you showed profits, average profits of 50 percent in this industry, we would not contend that that in and of itself was any logical relevant proof of the existence of a combination; that is why we have kept it out, not because we were afraid of it at all, so I say, Your Honor, that the length of time is a factor to take into account. The basis of investment

alone on which the return is figured is something that would have to be gone into to see whether that investment is inflated or not, whether the capitalization is inflated, so it would take longer to finish the case if we go into that than it has already taken, but the legal issue is one of relevancy, and I say that it is irrelevant, not only as a matter of plain logic and common sense, but on the basis of the high
47502 est precedents of the Supreme Court, and in the last few months in the Wisconsin Oil case they did just what they did in the Trenton Potteries case, only they qualified it so it was clear beyond any contention of any doubt that the existence of profits or losses in an industry is irrelevant to the issue of whether the prices are the result of a combination. The Sugar Institute case that Mr. Bond referred to, of course, came in between the Trenton Potteries case and the Wisconsin Oil case. Now, as a matter of logic, their own economists would not contend that this was any basis on which to determine the existence of a combination. Dean Griffin, on cross-examination, said that he would not attempt to say that any particular rate of profit or loss was indicative of a combination or a lack of a combination. The writings of their own economists that were brought forth on cross-examination further established that same point.

Now, Mr. Bond says at the outset of his statement that there is no direct evidence in this case of a combination, and, therefore, you look to this circumstantial evidence of which they contend profits and losses are a part. I challenge that statement, that there is no direct evidence. There is a great mass of direct evidence in this case of a combination. That all depends on one's definition, of course. Mr. Bond did not define his term "direct."
47503 I will define mine when I say there is a mass of direct evidence by saying it consists of the writings and minutes and the communications and the oral testimony of these Respondents themselves. There is a great mass of it. It is not left merely to circumstantial inference but even if left to circumstantial inference you can't draw any inference as to the existence of a combination from the state of profits or losses in the industry.

Of course, it is obvious that this period of eight years covered by the offer of proof includes several of the worst depression years ever known, and, of course, you have to

make allowance for that, and depression years might wholly or largely defeat the effectiveness of an existing combination, but it would not establish its non-existence at all. I can only say in closing, Your Honor, that the injection of such an issue into an anti-trust case has the purpose and effect of so cluttering up the issues that it just defeats the purpose of the anti-trust laws themselves, and the Supreme Court clearly saw that and clearly stated it, I will say, in its recent Wisconsin Oil case.

That is all I have to say.

Mr. Leisure: Well, we are pleased to observe that Mr. Wooden is not afraid of this evidence, and that is not the reason he wants to keep it out. We think it is very
47504 important in the case, and we stated our position very clearly to Your Honor as to why we think it is important. As I understand it, Your Honor has rejected the offer of proof.

Trial Examiner Norwood: The evidence is rejected. Counsel has his exception, and the proffer is on the record. I did not wish to imply that this is not very valuable information. In fact, there is a great—and that it would not be used either by the Commission or the Congress for the benefit of this industry, and it is properly tagged so that it may be made available in case the Commission decides to take any action in this industry whatsoever.

47506 ROBERT S. SCHULTZ, JR., called as a witness for the Respondents, being first duly sworn, testified as follows:

Direct Examination by Mr. Bond:

47507 I am connected with the organization known as Ford, Bacon & Davis, Inc. I am senior engineer, and have been associated with them for about 5½ years.

I am a graduate of Columbia University in New York, School of Mines, Class of 1906, with the degree of Engineer of Mines. From graduation until 1912 I was with the Victoria Copper Mining Company at Victoria, Michigan. I started there as the one engineer of the company, later was made chief engineer and somewhat later assistant superintendent. In these positions I had charge of all the engineering work of the company, and as assistant super-

intendent had charge of really all the operations of the company, including shaft sinking and under-ground operations, all construction on the surface, and a large engineering project in connection with the contemplated development of water power. 1912 to 1916 I was with the Atlas Portland Cement Company at its Hannibal, Missouri plant.

I started there in charge of the development of the
47508 new shale mine for the company which took approximately six months. At the end of that time I was made chief engineer at the plant, later became chief engineer of the Western Division of the company. In these positions I had charge of all engineering construction work for the company including one rather large rebuilding, remodeling program, and a number of projects that continually occur in a plant of that nature. I also had charge of investigations of new properties, the inspection of purchase and erection of plants,—several purchases were investigated under my supervision,—and also investigation of existing properties with the idea of purchase. All of these involved considerable amount of estimating and appraisal work, particularly on the part of existing plants and companies.

From 1916 through 1919 I was with the Marquette Cement Manufacturing Company at LaSalle, Illinois. I started there with the title of consulting engineer in charge of an investigation of damages being sustained in the limestone mine of the company as the result of long wall coal mining some distance below the limestone deposit. I also had charge of the supervision, at any rate, of the engineering work and construction work for the company; that involved a considerable program of remodeling, rebuilding, and extensions, and also the development of a large waste heat boiler plant—

47508 Trial Examiner Norwood: May I ask what you are going to show by this witness?

47509 Mr. Bond: A portion of the testimony will be directly connected with the offer of proof which Your Honor has rejected in the matter of Price-Waterhouse. That portion you would desire an offer of proof on and would rule consistently with your ruling on the other evidence. There is futher evidence from this witness along other lines entirely that I will rest upon his judgment as an expert engineer and that is my reason for taking some time to state fully his qualifications.

Trial Examiner Norwood: That is his expert testimony on the—

Mr. Bond: On engineering problems.

Trial Examiner Norwood: —on the economic location of mills and things like that?

Mr. Bond: No, if Your Honor please, but on engineering problems connected with the use of cement in the industry generally.

Trial Examiner Norwood: Do you mean you are going into proportions of output?

Mr. Bond: Of output?

Trial Examiner Norwood: Yes.

Mr. Bond: No, if Your Honor please, nothing to do with cost of operations, or anything of that sort, nothing to do with profits. It will not be a long examination but I did wish to qualify the witness fully because I must
47510 rest upon his standing as an expert.

Trial Examiner Norwood: Well, Counsel has not mentioned any relevant purpose yet.

Mr. Bond: Well, the first part of the testimony, as I said, would tie up directly with Price Waterhouse survey to show the reproduction cost new of the plants, of these fifty companies, whose profits on investment were determined by Price, Waterhouse & Company; that is to show—

Trial Examiner Norwood: Well, that entire line has been excluded and you have your exceptions on it, and it would do you no good to have another witness on it.

Mr. Bond: That I will simply cover with an offer of proof, I assume.

Trial Examiner Norwood: Yes.

47511 Mr. Wooden: If Your Honor please, in connection with our previous objections, we want to object to going into this line of proof, which we have always contended and still contend is irrelevant and immaterial on the issue whether there is or is not a combination in restraint of trade.

Mr. Bond: Well, we have not reached that point yet.

Trial Examiner Norwood: Well, I think the Government objected to some of this testimony because the proportions were not given, and there is evidence in the record that the percentage of cement to the other materials in these products where it is used is always small.

Mr. Wooden: That was over our objection that such evidence was received.

47512 Mr. MacIntyre: If Your Honor please, I believe Mr. Bond has thought something about his economists and not about economists that the Commission called. They did not, as I recall the record, touch the question of elasticity or inelasticity of demand, but that point—unless by cross-examination by Mr. Leisure, or Mr. Zimmerman, I cannot tell what they asked them about, but as to the direct examination the question of elasticity and inelasticity of demand was not gone into by Mr. Wooden with either of the expert economists that he called.

Trial Examiner Norwood: Well, I do not think that anybody denies that.

Mr. Bond: Your Honor will recall that we had this same grand argument here when we called our first economist, and went into the question of elasticity of demand, and I had to produce the testimony of their own expert on direct.

Trial Examiner Norwood: You may go ahead
47513 with this witness.

Trial Examiner Norwood: On the record.

Now, you need not go into details; just give us the highlights of your professional experience.

From 1918 I was in Washington for a while, as a commodity expert for the War Trade Board, in charge of cement and similar products; and in 1920 to 1923 I was with Hardinge Co. of York, Pennsylvania and New York on the reconstruction of the Continental Portland Cement Company plant at St. Louis, also on certain sales developments and cement work; in 1923 through to 1924, as general manager of the Acme Cement Corporation at Catskill, New York. 1924 through 1926 I was consulting engineer, most of my time being taken by the Great Western Portland Cement Company at Kansas City, with a point at Mildred, Kansas. The work there involved a considerable amount of construction and rebuilding. I was employed during that same period by a number of other cement and industrial companies. From 1926 through 1933 I was associated with my brother in the development of a vegetable oil extraction process which blew up with the depression.
47514 1933 to 1935 I was in consulting practice for myself, and from 1935 to date I have been with Ford, Bacon & Davis.

I have testified in other court proceedings in which I was accepted as a qualified expert. I have testified on possibly half a dozen occasions.

47514 Q. Can you give us an estimate of the amount of investment in cement mill construction with which you have been personally connected?

Mr. MacIntyre: That is objected to as irrelevant and immaterial. It is going into cost of cement mills.

Trial Examiner Norwood: Read the question.

(Question read.)

Trial Examiner Norwood: The objection is overruled.

A. On the order of $20,000,000, I would say.

By Mr. Bond:

47515 Ford, Bacon & Davis has been in existence for 46 years. We handle practically any form of engineering. We are known as an engineering firm, and we do practically anything in that line, including a great deal of appraisal work and design work, similar forms of engineering. I do not know that I can give a direct answer as to any estimate of the number of general plants that the firm has appraised. We have some 2,500 to 3,000 clients on our list; for a large number of them we have made appraisals. The total amount involved in these appraisals is from 9 to 10 billon dollars. These appraisals were made for a variety of purposes, frequently for tax purposes, for reorganization, consolidation, some times for insurance. There is no fixed purpose. We have covered practically all types of properties at one time or another, but

47516 our main field is in industries and utilities. At one time or another Ford, Bacon & Davis has done work for some 35 or 40 different cement companies.

Mr. Bond: If Your Honor please, I tender the witness as a duly qualified expert in the field of engineering, including appraisals.

Trial Examiner Norwood: Do you want to ask him any questions?

Mr. MacIntyre: Do we understand that Mr. Bond is to make an offer of proof on this matter that goes to the offer that was made when the last witness was on the stand?

Trial Examiner Norwood: Well, that may develop. I do not know. That is not the question now.

Mr. MacIntyre: Well, I would like to know before I make any further statement just what is to be offered through this witness which has not heretofore been ruled on, and which we may consider that the witness may

47517 be permitted to testify about.

Trial Examiner Norwood: Wait a minute. He is offered here as an expert engineer.

Is there any objection?

Mr. MacIntyre: Well, it depends altogether on what line of questions that he would be permitted to answer.

Trial Examiner Norwood: Go ahead.

Mr. MacIntyre: I can see that if he were permitted to answer questions that go to the offer of proof that Mr. Bond has heretofore made concerning the witness who preceded him, of course there would be no objection to accepting this witness to so testify if he were permitted to testify on that line, but when we go to some other line that would probably have—we would probably have some questions, and we just want to know whether or not there can be any distinction at this time made in the lines.

Trial Examiner Norwood: Well, I am accepting him as an engineer here within the fields which he has described here, and I shall have to decide certain questions on certain subjects which come within that field, and we will take that up with each question as we come to it.

Mr. MacIntyre: Now, in that connection, did we understand from Mr. Bond that he proposes to prove through the witness the costs, or the proportion of total
47518 costs or materials in buildings that is made up of cement?

Mr. Bond: There is no question put to the witness yet.

Trial Examiner Norwood: No, no. You will have to wait to find that out.

Mr. MacIntyre: Well, we have a voir dire on the witness we would like to make before we accept them.

Trial Examiner Norwood: I have already accepted him. Now, go ahead.

Mr. MacIntyre: Before accepting him as qualified to testify on such line.

Trial Examiner Norwood: Go ahead.

Mr. Bond: Now, in accordance with my statement to Your Honor, it was our purpose to prove through this witness the reproduction costs of the cement plants of this Respondent who were included in the Price-Waterhouse survey concerning which we offered Mr. Lothrop, of Price-Waterhouse, as a witness, and the purpose is to demonstrate that the figures found by Price, Waterhouse & Company to be the total investment in their cement plants, and the individual investment in cement plants of the various

companies which Price-Waterhouse used to calculate the return on the investment represented actual cost without depreciation because they were substantially lower than reproduction costs.

47519 Now, I understand Your Honor excludes that line of testimony which would support what we offer to prove through Mr. Lothrop.

Trial Examiner Norwood: Yes. Make your offer of proof.

Mr. Bond: May I just say that we feel that this survey, in conjunction with the testimony which we offered from Price-Waterhouse, would negative any inference that the Respondents have operated pursuant to a combination in restrain of trade as alleged, and we feel that we are meeting the circumstantial evidence through the testimony which we offered from Price-Waterhouse, and that this evidence is an integral part of the picture which that testimony would have presented; therefore, since Your Honor has excluded it I make the following offer of proof.

I offer to prove through this witness that an examination of the plants and equipment of the fifty cement companies hereinafter reported, shows that as of January 1, 1938, the total reproduction cost of new cement manufacturing facilities used in domestic cement operations was $441,236,650 for the 121 plants of these fifty companies. These fifty companies are as follows:

Aetna Portland Cement Company, Detroit, Mich.
Alpha Portland Cement Company, Easton, Pa.
Beaver Portland Cement Company, Portland, Ore.

47520 Bessemer Limestone & Cement Company, Youngstown, Ohio.

Calaveras Cement Company, San Francisco, Calif.
Castalia Portland Cement Company, Pittsburgh, Pa.
Consolidated Cement Corporation, Chicago, Ill.
Coplay Cement Manufacturing Company, Coplay, Pa.
Cumberland Portland Cement Company, Cowan, Tenn.
Dewey Portland Cement Company, Kansas City, Mo.
Diamond Portland Cement Company, Middle Branch, Ohio.
Edison Cement Corporation, New York, N. Y.
Federal Portland Cement Company, Inc., Buffalo, N. Y.
Florida Portland Cement Company, Chicago, Ill.
Georgia Cement & Products Company, Atlanta, Ga.
Giant Portland Cement Company, Philadelphia, Pa.

Glens Falls Portland Cement Company, Glens Falls, N. Y.
Great Lakes Portland Cement Corporation, Buffalo, N. Y.
Hawkeye Portland Cement Company, Des Moines, Iowa.
Hercules Cement Corporation, Philadelphia, Pa.
Hermitage Portland Cement Company, Nashville, Tenn.
Keystone Portland Cement Company, Philadelphia, Pa.
Kosmos Portland Cement Company, Louisville, Ky.
Lawrence Portland Cement Company, New York, N. Y.
Lehigh Portland Cement Company, Allentown, Pa.
Lone Star Cement Corporation, New York, N. Y.
Lone Star Cement Corporation, New York, N. Y.
Medusa Portland Cement Company, Cleveland, Ohio.
47521 Missouri Portland Cement Company, St. Louis, Mo.
Monarch Cement Company, Humboldt, Kansas.
Monolith Portland Cement Company, Los Angeles, Calif.
Monolith Portland Midwest Company, Los Angeles, Calif.
National Cement Company, Birmingham, Ala.
Nazareth Cement Company, Nazareth, Pa.
North American Cement Corporation, Albany, N. Y.
Northwestern States Portland Cement Company, Mason City, Iowa.
Peerless Cement Corporation, Detroit, Mich.
Pennsylvania-Dixie Cement Corporation, New York, N. Y.
Petoskey Portland Cement Company, Petoskey, Mich.
Signal Mountain Portland Cement Company, Chicago, Ill.
Southern States Portland Cement Company, Rockmart, Ga.
Southwestern Portland Cement Company, El Paso Texas.
Spokane Portland Cement Company, Spokane, Washington.
Standard Portland Cement Company, Cleveland, Ohio.
Superior Cement Corporation, Portsmouth, Ohio.
Trinity Portland Cement Company, Chicago, Ill.
Universal-Atlas Cement Company, Chicago, Ill.
Volunteer Portland Cement Company, Knoxville, Tenn.
Vulcanite Portland Cement Company, Philadelphia, Pa.
West Penn Cement Company, Butler, Pa.
Wolverine Portland Cement Company, Coldwater, Mich.

That these are the same fifty companies as were
45722 covered by the Price-Waterhouse survey.

I further offer to prove that the total production

costs new of such cement manufacturing facilities are larger than the net investment in such facilities found by Price-Waterhouse in its survey, and that such reproduction cost new is larger than the net investment in the facilities of the respective companies as found by Price-Waterhouse.

I further offer to prove that this survey does not include any allowance for mineral reserves, lands, transportation facilities used in the shipment of cement from plant, housing facilities, or for other properties not directly connected with the manufacture of cement.

I further offer to prove that this survey was made covering the same manufacturing facilities as was determined by Price-Warehouse to be $137,213,236 as of December 31, 1937.

I further offer to prove that this survey was made on the basis of a physical inspection of the manufacturing facilities covered, and I offer to make all of these details of said valuation by companies, plants, and each of them of plant facilities, available to Counsel for the Commission available in the event this evidence were received and, that the plant facilities will be open to engineers of the Commission for their examination.

47523 I further offer to call any of the employees of Ford, Bacon & Davis for cross-examination if the evidence is received.

I understand that Your Honor has rejected the offer.

Trial Examiner Norwood: Yes.

Counsel has his exception.

By Mr. Bond:

Q. Mr. Schultz, I want to obtain your expert opinion as to the percentage cost of cement in various types of construction work, and you will understand, please, that when I use that phrase I mean in each case the percentage which cement cost bears to total cost of construction.

First, let me ask you, what, in your opinion, is the percentage cost of cement in the construction of dwellings and apartment buildings?

Mr. MacIntyre: I object.

First, I object on the ground it is irrevelant and immaterial, and if Your Honor should rule against me on that I have other objections, but I state only those at this time.

Trial Examiner Norwood: Well, I do not think I
47524 will rule against you on that, but I thought Counsel was going into this volume percentage there, which had some bearing on elasticity of demand.

Mr. Bond: That is right; if Your Honor please, it does.

Trial Examiner Norwood: Percentage costs do not enter into that, do they.

Mr. Bond: Well, you could measure the proposition either with a yardstick which would mean measuring the size of a barrel of cement against the size of locks and bolts, but I know of no way of finding the proportion of cement to the total except in terms of money.

Trial Examiner Norwood: No, but you are bringing in testimony about cement in terms of its relation to the—

Mr. Bond: Total cost.

Trial Examiner Norwood: —to its cost relation with other articles used.

Mr. Bond: No, to the total cost of the building, that is exactly in accord, if Your Honor will recall, with the testimony of the economists. They said the cost of cement is a minor part of the total construction costs, or they did not make that definite assertion, they said if it is and when it is, when a product is in that position then it has of necessity an elastic demand. Now, this is exactly—

47525 Trial Examiner Norwood: I think Counsel is right. I had the other angle in mind.

What have you got to say? I will hear your further objection.

Mr. MacIntyre: The question as you noted goes to the total cost of the building, as to whether or not a labor union is involved there, with plumbers at $4 an hour or painters at $1.75 an hour, or plasterers at $2 an hour is all beside the point. Most certainly we are not going to begin now to compare the cost of cement in a building with the cost of union plumbing, and that is exactly what this pending question comprehends.

Trial Examiner Norwood: No, he just wants to show the—

Mr. MacIntyre: May we have the question read, if Your Honor please.

Trial Examiner Norwood: He just wants to show the cost—

Mr. MacIntyre: The total cost of the building, labor, materials, permits, everything else, license.

Trial Examiner Norwood: No, the proportion of the cost of cement to the total cost of the building. In other words, just what part of a building is cement.

Mr. Bond: That is right.

Trial Examiner Norwood: I think he may do that.

47526 Mr. MacIntyre: But can cement itself replace the plumbing; if the cost goes up or the cost goes down, that would not be elastic with plumbing.

Trial Examiner Norwood: That is not the question.

Mr. MacIntyre: May we have the question read? It is to the total cost, including the labor involved.

Trial Examiner Norwood: Read the question.

(Question read.)

Mr. MacIntyre: That includes plumbing with which cement is not in competition and all other labor products.

Trial Examiner Norwood: Now, there is another angle to this matter. I think this matter of elasticity is a mere minor issue here.

Mr. Bond: Oh, if Your Honor please—

Trial Examiner Norwood: Now, you are proposing to show this in buildings, it is going to open this thing up, the question naturally arises what percentage of road building is cement, goes into other things where the proportions are much greater.

Do you propose to show all that by this witness?

Mr. Bond: We propose to cover the percentage in road work, yes, if Your Honor please.

Trial Examiner Norwood: Well, go ahead.

The objection is overruled.

Mr. MacIntyre: Well, as to the ruling now on 47527 relevancy and materiality, I have an objection also to the incompetency. We have not as yet seen this witness qualified as an expert to testify as to the percentage or proportion of the cost of cement, the total cost of not only materials but total building cost of anything other than the cement plants, silos, and such construction that he was engaged in between the years 1906 to 1935 in the cement industry itself. Subsequent to 1935 the witness has told us that he was interested and engaged primarily in the Ford, Bacon & Davis Company as a consulting engineer, dealing with appraisals on industries and utilities. I refer you to the statements made by the witness in his qualifying statement. Now, if he is to be permitted to testify in response to the question now pending I must

ask, in order that I may show the foundation for the objection as to his competency, that I be permitted to question him on voir dire, which I would have been done if he had been tendered as an expert qualified to testify with respect to this line of questions. That is what I had in mind when I asked before he was tendered and accepted as an expert generally.

Mr. Bond: Now, we have made a complete disclosure of what this witness was going to testify to when he first took the stand. We qualified him, and Your Honor has accepted him as an expert, and I submit that any-
47528 thing such as Mr. MacIntyre suggests should come as cross-examination.

Mr. MacIntyre: I submit it should not go over to cross-examination because it will take endless time to unravel the confusion that will develop if he is permitted to answer all these questions on direct and have the cross show that he was not qualified to so testify.

Trial Examiner Norwood: Read the question.

(Question re-read.)

Trial Examiner Norwood: Now, you had professional experience on which to base an opinion in answer to that?

The Witness: I have, Your Honor, yes.

Mr. MacIntyre: May I ask some voir dire questions on that, if Your Honor please?

Mr. Bond: I object.

Trial Examiner Norwood: Well, I think my question covered it.

Go ahead.

Answer the question.

A. The percentage cost of cement in dwelling and apartments would average about 2 to 3 percent of certain types of construction, particularly dwellings where cement is used for nothing but foundation, it will run less than that, possibly under 1 percent, and reinforced concrete apartments, fireproof apartments, it may run up to 5 or 6 percent.

47529 By Mr. Bond:

Q. Now, take another type of construction, reinforced concrete warehouse and factories and mills, what, in your opinion, would be the percentage cost of cement in this type of construction?

A. That type of construction will average about 5 percent, but, again, that is the cement cost in that type of

construction, will average about 5 percent, but there, again, the cost will vary between considerable limits as a result of the use to which the structure is to be put.

For instance, in buildings where a serious problem of vibration may arise, the construction cost, or the cement, percentage of cement cost in construction might run up as high as 9 or 10 percent.

47530 Q. Now, taking as a general group other types of industrial and commercial buildings, what, in your opinion, would be the percentage cost of cement?

A. The average cost of cement in construction of this nature will run around 4 percent, but, again, that cost will vary with the type of construction and the use to which the structure is to be put. We might put limits of between 3 and 8 percent, I would say. Occasionally it might run as high as 10.

Q. Now, turning to certain types of heavy construction, and taking first subways, what, in your opinion, would be the percentage cost of cement for these?

A. The percentage cost of cement in subway construction is lower. It will be somewhere around 2 percent. It might, under certain circumstances, run higher, possibly up to 3, or , again, lower, down to 1 or 1½, but an average of 2 percent would cover the usual subway construction.

Q. Now, taking the case of tunnels, water supply systems, and shafts, what, in your opinion, would be the percentage cost of cement for these?

A. The percentage cost of cement for that type of construction will run quite a little bit higher.

47531 It will run up to—oh, five or six percent. For shafts and for tunnels that are carrying heavy loads, heavy pressures, it will run even higher. It will run 8 to 10 percent.

Q. Now, turning to reinforced concrete bridges, what, in your opinion, would be the percentage cost of cement for these?

A. The percentage cost of cement in reinforced concrete bridges will probably average around eight or nine percent, but there, again, there are rather wide ranges, depending upon the type of structure and the loads to be carried, and so forth. I might put limits of between five and twelve percent.

Q. What, in your opinion, would be the percentage cost of cement for cement dams?

A. The percentage cost of cement in dams will probably vary more widely than in almost any other type of construction. I estimate that an average would be around six to seven percent, but for certain types of dams and in certain locations, under certain pressures, it probably would run up to 15 or 16 percent.

Q. Now, taking the item of highways and roads in which the cement is used, what, in your opinion, would be the percentage cost of cement for these?

47532 A. The percentage cost of cement used in highway construction, with which I am familiar, is around 15 to 16 percent. That, again, varies with the particular requirements that have to be met by the road. It may run as low as 6 or 7 percent, but rarely higher than 15 to 16 percent.

By Mr. Bond:

Q. Now, Mr. Schultz, taking the remaining items of heavy construction which I have not questioned you about specifically, such as underpasses, viaducts, stadia, canals, sewage, grade crossings, et cetera, what would be the range of percentage cost of cement in this general class of construction?

A. Well, the range in cost of cement for this type of construction will vary widely.

47533 A. The range for that type of construction, I would say, would be between 2 percent and 15 percent, with an average of probably around 5 percent—5, or maybe 6 percent.

By Mr. Bond:

Q. Mr. Schultz, what is meant by the term "aggregates"?

A. "Aggregate" is a term used in concerte construction to cover the sand, gravel, or crushed stone, or crushed slag, or somewhat similar materials which are in the inert materials, to which cement is added to make concrete.

Q. How, in your opinion, does the percentage cost of cement in general construction work compare with the percentage cost of these aggregates?

47534 A. In my experience, the cost of the aggregate exceeds the cost of the cement used.

47535 *Cross-Examination by Mr. MacIntyre.*

I have testified that I was engaged from 1906 to 1912 in copper mining enterprises. I have testified that from 1912 to 1916 I was an employee of the Atlas Portland Cement Company doing construction work. I was not in consultation concerning their quarries; I think you misunderstood that. I had very little to do with the quarries, except as engineer of the plant. I went with the company originally as mining engineer, in charge of opening a new shale mine. They secured this supply of shale at that property from a mine. The old mine had caved in, and it was my duty to open up a new mine just as quickly as it could be done. I have testified that I was a construction engineer of the Marquette Company and a consulting engineer in that connection during 1919. I have testified that I was with the War Industries Board during the year 1918; I was "here" as a technical expert with the Bureau that
47536 was operated jointly by the War Trade Board, War Industries Board, and the Shipping Board. My duties were to handle any problems that any of the 3 boards might bring up with reference to cement, limestone and lime.

47536 Q. Just what problems did you handle during that year that they did bring up to you?

Mr. Bond: Did you finish your answer, Mr. Schultz?

The Witness: Well, there were one or two other products that I handled.

A. Well, there were problems with reference to the allocation of demand by the various industries requiring cement, whether cement would be used in a particular type of construction, cement or any of these other materials, or what might be any technical problem, really, that came up in connection with those.

By Mr. MacIntyre:

Q. You spoke about problems. Do you mean buildings for the Federal Government or for private enterprise?

A. For any industry. You may know that at that time there was a question about the allocation of production, so that one industry or one plant would not be able to get material, and another plant would get it, depending upon the importance of that production.

47537 Q. So that the problems that came to you in that connection were questions as to whether or not the War Trade Board released, by approval, the privilege of buying certain materials as against some other unit in that industry or other industries.

A. I do not quite understand that question.

Mr. MacIntyre: Will you please read that question.

(Question read.)

A. Yes; that essentially covers the situation.

Q. Did you find it necessary to go into the costs of each of the materials that thus were released under those privileges?

A. Costs did not enter into the problems at all.

Q. Now, I believe your stated that during the period subsequent to your connection with the War Trade Board you worked for the Continental Cement Company.

A. No; I was back with Marquette for about a year, and then went with the Hardinge Company, in charge of the rebuilding of the Continental—what was then the Continental plant at South St. Louis. It is now Alpha.

Q. It is now part of the Alpha Portland Cement Company?

A. Yes.

Q. And that took your efforts into 1923?

A. No; that was late in 1919, and 1920 and 1921. That work was not completed until about the beginning of 1921.

Q. What did you do between 1920 and 1923?

47538 A. I was with the same company, handling sales work and the development of machinery and equipment for cement mills. The company had never been in that field before and they wanted to go into it.

Q. So that you concerned yourself with the building of cement mills in those two years and the problems concerning such building?

A. In the construction very largely; also power plants. We were doing quite a little bit in coal pulverizing.

Q. I believe you testified that you were general manager of the Acme Cement Corporation in New York in 1923 and 1924?

A. That is correct. That is now known as the North American Cement Company.

Q. You were with the Great Western Cement Company at Mildred, Kansas, during 1924 to 1926?

A. That is correct.

Q. You were in the vegetable oil business?

A. I was in the consulting capacity there in Kansas City. I was also working for certain other companies.

Q. On what problems did they consult you during that period?

A. Construction, operation—

Q. What kind of construction?

A. Power plant construction, separate power plants, cement mill construction, fuel economy, and other problems in cement manufacture.

47539 Q. I believe you stated that you were in the vegetable oil business from 1926 to 1933.

A. That is correct.

Q. And as consulting engineer what problems did you handle during the period from 1933 to 1935; that is, of a general nature?

A. Most of the work at that time was in connection with boiler plants, the installation of boiler plants, and the installation of boilers and similar equipment.

Q. What outside of that did you do during that particular period?

A. Well, that alone kept me pretty busy.

Q. That is, in the constructing of boiler plants.

A. Yes; in the operation of boiler plants.

Q. I believe you stated that since 1935 you have been handling appraisal work for Ford, Bacon & Davis Corporation.

A. No, sir; I have been with Ford, Bacon & Davis, and as a matter of fact very little of my work has been on appraisal.

Q. What has been your work with them?

A. I have been engaged in various forms of engineering construction programs for quite a considerable number of companies, clients of Ford, Bacon & Davis.

Q. Name the type of companies involved. Were they all industrial, utilities?

47540 A. No; the Crowell Publishing Company, at Springfield, Ohio. I do not know whether you would consider that industrial or not.

Q. Let us take that one company now. What work did you do in connection with that one company which Ford, Bacon & Davis rendered them during your service?

A. My work there covered a complete investigation of the manufacturing facilities of the company, including the

contemplated relocation of the plant, with design and estimates of the cost of construction of various types of buildings to replace the existing plant. That plan was discontinued and we then concentrated on a new extension directly across the street from the other existing plant to augment their existing facilities.

Q. When you say that you were engaged in the problems of the cost of construction on their buildings, what did you do in connection with going into their problems?

A. We made preliminary designs, and from those designs we made estimates of the cost.

Q. What were the estimates of cost based on; how did you arrive at the estimates?

A. We would figure the number of yards of concrete, for instance, the pounds of reinforcing that might be required for the job—the usual method of making an estimate of cost of the materials and labor going into building construction.

Q. Where did you get the other costs that you
47541 used in the estimates?

A. May I have that question amplified?

Q. Well, you stated you based your estimates on some computations of the cubic yard of concrete and like matters. How did you compute the labor cost in that instance?

A. Labor cost—in fact, in computing the cost, estimating the cost of construction, the labor cost is included in the figure.

Q. In what figure?

A. Well, for example, so many yards of reinforced concrete, the experience that we have had over a great many years on that type of construction indicates about the number of hours of the type of labor that would be required for that construction, and knowing the labor rate at that point of construction we can estimate the cost.

Q. In other words, you estimated the cost of putting in a cubic yard of concrete, the cost of that cubic yard of concrete placed in the construction?

A. In the building; yes.

Q. In connection with the labor, did you break down the cost of that cubic yard of concrete so that you could determine from your consideration the cost of the cement, or, we will say, the return on that cement that the producer received?

Mr. Bond: If Your Honor please, that is a double question.

Mr. MacIntyre: The latter part of the question is
47542 the question.

Mr. Bond: There are two questions there.

Trial Examiner Norwood: Read it.

(Question read.)

Mr. MacIntyre: I will try to clarify that by saying the amount that was paid to the producer for the cement thus used.

Mr. Bond: That is not a question, Your Honor. I assume you want to add something.

Mr. MacIntyre: That is a clarification of the question, Mr. Bond.

Mr. Bond: Well, you cannot—

Trial Examiner Norwood: You are asking him if he has computed that as the cost, the amount, that the consumer or the contractor has paid to the producer for it.

Mr. MacIntyre: I am attempting now to find out from the witness whether or not in any of the estimates that he made of cost of different materials he broke it down sufficiently to determine what part of that cost was represented by the amount paid to the producer for the cement.

Trial Examiner Norwood: Well, he may answer. He can tell us that.

A. Well, if you mean actually paid to the mill, I have not any idea. The price the company that we were
47543 working for would have to pay for it is the figure that we used, to pay the supplier or the dealer or whoever it may be that was supplying the cement.

By Mr. MacIntyre:

Q. And you broke that down sufficiently to be able to determine the amount that the construction company paid to the supplier for the cement, whether it be a producer or a dealer in cement?

A. Yes.

Q. How many projects have you gone through with that method of computation down to that point, since you have been with Ford, Bacon & Davis?

A. On five large jobs that I think of, probably, and there have been other smaller ones.

Q. You think there have been a few smaller ones and five large ones out of these that you came in contact with in the five years that you have been with Ford, Bacon & Davis?

A. Well, you understand, a large job may take up a year or more. Six months is not at all unusual.

Q. Your experience, though, has been with this number that you specified, on this point?

A. Yes.

47545 Q. Now, Mr. Schultz, when you told us about the proportion of the cost of cement to the total cost of buildings, such as apartments and dwellings, and that type, what you gave us there as the total cost included labor in the construction of the building; did it?

A. Yes.

Q. What would you say was the proportion of the cost of that labor to the total cost of buildings of that type?

Mr. Bond: I object, if Your Honor please. I do not see how this is relevant.

Trial Examiner Norwood: Objection overruled. I think I overlooked Counsel's point heretofore.

Mr. Bond: Overlooked it?

Trial Examiner Norwood: Overruled.

Mr. Bond: There is no issue here involving the question of labor to the total cost.

47546 Trial Examiner Norwood: I think the proportions as between cement and other materials used is the—

Mr. Bond: Well, let me point out, if Your Honor please, that the point is on inelasticity; would a reduction in price increase the demand proportionately? Now, that rests upon the use of cement, and as one of the components of that building construction is the amount which that reduction will affect the total cost of that construction, including labor, that is relevant.

Trial Examiner Norwood: You have figures in on that. Now, if he wants to, he may bring these others out.

The objection is overruled.

The Witness: May I have the question again, please?

Mr. MacIntyre: Please read the question.

(Question read.)

A. You are referring to dwellings and apartments?

Trial Examiner Norwood: Yes.

By Mr. MacIntyre:

Q. Apartments and dwellings.

A. The cost of labor in that type of construction will run around 40 percent.

Q. Forty percent?
A. Yes, sir.
Q. And when you say "labor" you are talking there merely about the labor in the putting of these mate-
47547 rials together, in putting the building up; that is the only labor?
A. That proportion of the total cost of construction; yes.
Q. That means that the total cost of materials would be, say, three-fifths or 60 percent of the total cost of the building?
A. Oh, no.
Q. The labor is 40 percent?
A. Yes. There is an overhead in there, in the total cost.
Q. What is the overhead cost?
A. These buildings are usually built on contract. You have the salaries in the contractor's offices, rental of equipment, purchase of equipment, and office space. That will all run on an average of around 25 percent.
Q. In this type of building?
A. That will apply to almost any type of building.
Q. Twenty-five percent?
A. Yes.
Q. To those items throughout?
A. Contractors' overhead will run pretty close to 25 percent.

Trial Examiner Norwood: Are you dividing up the total cost of construction in these buildings into 25 percent overhead?

The Witness: Yes, sir.

Trial Examiner Norwood: Twenty-five percent of the total?

The Witness: That is approximately correct.

47548 Trial Examiner Norwood: And 40 percent labor; is that right?

The Witness: That is for this type; yes.

Trial Examiner Norwood: Yes.

By Mr. MacIntyre:

Q. So in this type of building, apartments and dwellings, your material cost, that is, excluding this overhead, the labor, would be 35 percent of the total cost of the building?
A. That is it.

Mr. Bond: My objection goes to the entire line, if Your Honor please.

Trial Examiner Norwood: Yes.

By Mr. MacIntyre:

Q. Now, let us look to the reinforced concrete buildings. As a type, what would you say would be the cost of the labor that is in the total cost there?

A. The cost of labor there will be approximately the same, the same percentage, on the lower side of the spread.

Q. In other words, labor there is approximately 40 percent of the total?

A. That would be somewhere around 35 percent.

Q. And the contractor's overhead, 25 percent?

A. Twenty-five percent will apply for almost any type of building.

Q. Leaving the labor cost in a concrete building 47549 as 35 percent; that is, approximately?

A. No; that would run that up pretty close to 40 percent, if you take 35 percent for labor.

Q. And as to factory warehouses, what percent of the total cost is the cost of labor in putting those up?

A. That will run—may I have the question again, please?

Trial Examiner Norwood: Read it.

(Question read.)

A. That will run more towards the higher side—around 40 percent.

Q. Labor would cost 40 percent on that?

A. Very close to 40 percent on that.

Q. And contractor's overhead?

A. About 25.

Q. Leaving 35 percent of the total cost as material cost?

A. That is about right.

Trial Examiner Norwood: Off the record for just a minute.

(Discussion off the record.)

Trial Examiner Norwood: Go ahead.

By Mr. MacIntyre:

Q. Now, as to the commercial type building, the cost of the labor is what percent of the total cost, Mr. Schultz?

A. Within the limits, approximately the same figures.

Q. Approximately 40 percent for labor?

47550 A. Thirty-five to forty percent, depending upon the type of construction, loads to be carried, et cetera.

Q. Leaving approximately 35 percent of the total cost for the cost of materials; is that correct?

A. That is about right.

Q. Now, as to heavy construction, and we will take the first item under that heavy construction, the item that Mr. Bond took, subways: What part of the total cost of the construction of subways is the cost of labor in that?

A. For that type of construction, the cost of labor will run a little bit higher. It might run, depending on conditions, as high as 40 to 45 percent, although I think that would be rather rare. I would say between 40 to 45 percent would cover the cost.

Q. Forty percent for labor?

A. Between 40 and 45 percent.

Q. Well, say, 42½ percent as an average.

A. I can't put any fixed percentage on it without knowing the conditions under which the particular structure will be built.

Q. Well, let us look for a moment at the subways in New York. Do you have any particular information from your experience to draw upon as to those in that respect?

A. One particular job that I know of is the Sixth Avenue Subway, that is now under construction, and in that particular job the labor will run about 40 percent.

47551 Q. You would say something over 40 percent as an average, then?

A. Well, on that particular job, the cost of that particular job involved a great deal of labor which would not be true in some construction.

Q. Well, can you not give us an average, as you see it, for that type of construction?

A. I am giving you it, between 40 and 45.

Q. And the overhead of the contractor running, as you say, about 25 percent?

A. Just about 25 percent.

Q. So that would give the material cost on such types of heavy construction, subways, of from 30 to 35 percent?

A. That is correct; yes.

Q. What about reinforced concrete bridges, what about your labor cost, and what proportion to the total cost is the labor cost there?

A. The labor cost there will run a little lower, and for the usual type of reinforced concrete construction it will run down to about 35 percent.

Q. And your contractor's overhead?

A. The contractor's overhead usually would be a little bit higher. I would put it for that type of construction at about 30 percent.

Q. Leaving the material cost as to the total cost

47552 about 35 percent; is that right?

A. Yes; about 35 percent.

Q. And concrete dams: What about your labor cost there?

A. The labor cost there will run a little bit higher. That will run pretty cose to 40 percent.

Q. Forty percent of the total cost?

A. Yes.

Q. And your contractors' overhead?

A. Well, under usual conditions, that will run pretty close to 30 percent.

Q. Leaving the material cost as to the total cost about 40 percent?

A. Yes. That is applying to concrete dams, of course. That does not apply to earth dams.

Q. The materials would be 30 percent; 40 and 30 from 100 leaves 30.

A. Yes.

Q. Is that correct?

A. That is about right.

Q. As to highways and roads, what is the labor cost there out of the total cost?

A. Well, for an average job, that will run pretty close to 40 percent.

Q. Labor cost?

A. Yes.

47553 Q. And the contractor's overhead?

A. The contractor's overhead will run between 25 and 30, say—30 for a job of that type.

Q. Leaving 30 percent of the total cost as the cost of material for the job?

A. Yes.

Q. And what do you say as to underpasses, overpasses, stadia, et cetera, as to labor costs out of the total cost?

A. The labor cost there will run a little bit higher, and the contractor's overhead a little bit lower, usually, there;

we will say 25 percent for overhead and pretty close to 40 percent, leaving around 35 percent for materials.

Q. Thirty-five percent?

A. Yes; about.

Q. Now, as to water supplies, shafts, and tunnels, and the like, what about your labor cost there as compared to the total cost?

A. Well, the total labor cost for that type of construction will run again pretty close to 40 percent.

Q. And contractor's overhead?

A. Contractor's overhead will run around 25, and the material cost will run the difference, about 35 percent, is it?

Q. Yes, about 35.

A. Yes.

Q. Now, I believe you told Mr. Bond that, by 47554 comparison, cement costs were lower than the costs of aggregates, sand, gravel, crushed stone, and crushed slag, and the like, used in fixing the concrete for concrete construction. Do you recall?

A. Yes.

Q. When you spoke of aggregates there, sand and gravel, you were not referring to sand, such as you dredge up out of the river, or take out of the pit, but you were talking about sand and gravel that is treated, such as washed sand and gravel and graded for a particular use in concrete work, which is specially prepared for concrete work and is transported to the job from the pit or place where it is dredged; is that right?

A. I don't know as I quite understand you.

Q. You were talking there about sand and gravel cost as laid down on the job for use on that job after having been treated, such as washed, graded, transported, dredged, quarried—

A. I was talking of any aggregate that may be suitable for preparing the particular type of concrete that was necessary on the job.

Q. But when you compared the cost of those aggregates with the cost of cement, you compared the cost of the aggregates after they had been quarried or dredged, washed, and graded, and transported, and all available costs going into them to get them to the job and to use on the job?

A. Yes.

Q. Which is something different from the sand
47555 which is found in the pit, the sand and gravel found in the pit; is that correct?

A. I am speaking of the materials as they are delivered on the job, ready to use with the cement also on the job.

Q. Now, in your experience with construction that has used cement, you found that there is an interchangeability of cement with brick and building stone construction; have you?

47556 Mr. Bond: You see, we were foreclosed, if Your Honor please; you will recall that we have been foreclosed repeatedly in the case from going into the question of substitutes.

Mr. MacIntyre: I remember that when Professor Hibbard was on the stand Mr. Zimmerman actually had Mr. Hibbard testify that molasses could be used in road building.

Mr. Bond: But we have several times in our direct case endeavored to put in testimony about substitutes—

Trial Examiner Norwood: I excluded it on numerous occasions because it was cumulative, but this has a bearing on the question of elasticity now. I think he may go into that, it having come up in that form heretofore.

Mr. Bond: No matter what his answers may be, they cannot affect the fact that cement is a minor part of the cost of construction, and that is what the witness has testified to.

Trial Examiner Norwood: I will permit him to try to show differently, if he can.

The objection is overruled. Go ahead and answer the question.

The Witness: May I have the question, please?

Trial Examiner Norwood: Read the question.

(Question re-read.)

47557 A. Do you mean a complete interchangeability?

By Mr. MacIntyre:

Q. No; where you have cement in concrete, have you not found that it could be substituted for brick, and brick substituted for it, in the construction of walls of buildings?

A. To a very limited extent. Brick cannot be substituted for concrete, but almost universally concrete can be substituted for brick. Certainly brick cannot be used for foundations and columns that have to carry loads.

Trial Examiner Norwood: Why do you say it is limited?

The Witness: Well, Your Honor, a brick foundation, for instance, is of very little strength as a foundation. It is built up on a number of independent units that are bonded together and limited.

By Mr. MacIntyre:

Q. Can you substitute stone for cement?

A. You cannot substitute stone any more than you can substitute brick. We have any number of places throughout the country where brick foundations and stone foundations have been used in the past, before cement was developed properly, and under those conditions those foundations were for carrying moderate loads, that could be carried very easily, but on concrete foundations they are are very extensive.

47558 Q. And you have found that there are other products which can be substituted for cement and substituted by cement in construction work, have you not?

Mr. Bond: May I have that question read, Your Honor?

A. To a very limited extent.

By Mr. MacIntyre:

Q. Mr. Schultz, you are acquainted with the fact that some of the large buildings that have recently been constructed in this city have reinforced concrete inner walls, and others of the same type have masonry unit inner walls of stone; are you not?

A. That is probably true; yes.

Q. In other words, natural stone in the inner walls is used in some types of buildings, and others reinforced concrete is used for cement; is that correct?

A. That may be true. I don't know. I am not familiar with construction in Washington personally right now.

47559 Q. Have you noted that in large heavy industrial buildings that is also the case, that some of them use masonry clay or natural stone units for inner walls, bearing walls, and in others they have used poured concrete, reinforced concrete?

A. I have no recollection of ever seeing anything in the line of hollow tile or anything of that sort, carrying loads.

Q. I am talking about brick and natural stone now, as

masonry units, that are used in some as bearing walls, and poured concrete used in others as bearing walls. You know that to be a fact, don't you?

A. That may be possible; yes.

Q. Well, you have seen that in industrial plants, have you not?

A. To a very limited extent. I am talking about walls carrying loads now, and I presume that is what you are speaking about.

Q. Have you seen many of the hangars that are under construction at various airports in this country being manufactured out of clay products; that is, units, with all the walls, the entire walls, inner and outer, being manufactured out of monolithic poured wall cement?

A. No; I can't say that I have.

Q. Have you examined any of them?

Q. Have you examined them?

A. No; I have not seen any hangars, except at La-Guardia Field, and I have not seen them very closely.

47560 Trial Examiner Norwood: But, as an engineer, can you say whether that could be done or not?

The Witness: I would say that it could be done under certain circumstances, Your Honor. It would depend entirely on the loadings and on the type of structure that was being built.

By Mr. MacIntyre:

Q. Let us take one and two-story factory buildings. You do know that the brick in many instances where such buildings are constructed was used in the bearing walls, and no concrete?

A. That is true for low buildings, not carrying very large loading.

Q. And you know other instances where buildings, even of a couple of stories, have had poured reinforced concrete walls?

A. That is true.

Q. And you know, of course, that many bridges are built of steel, with no concrete, except in the piers?

A. The piers and roadways and abutments.

Q. And you know of other bridges that are entirely of reinforced concrete?

A. Yes.

Q. And you know of highways that are built of brick, such as the State of Ohio is famous for?

A. Yes; I have driven over them.

Q. And you know others that are all concrete?

47561 A. Yes.

Q. And you know others of quarry rock?

A. Yes.

Q. Such as in the State of Florida?

A. I don't know any of those in Ohio.

Q. Do you know of the black top or oil highways in the Middle West, in such States as Iowa and in other States?

A. Yes.

Q. And, of course, you know that in some States they have used concrete?

A. Yes, I know of concrete highways.

Q. You know, therefore, that concrete, which is made in large part from cement, or with cement, is interchanged with other products for such uses?

A. I wouldn't say it is interchanged; no.

Q. Well, you know them to be built out of one product at one time and out of other products at other times; is not that correct?

A. That depends entirely on the loads that have to be carried on the roads.

Q. You are familiar with the fact that heavy loads go over highways of the State of Florida, as in engineer; are you?

A. Well, not comparatively heavy, heavy loads comparative to the loads that are carried in this part of the country, I would say.

47562 Trial Examiner Norwood: How about the Tarvia roads? Will not that stand up under a heavy load?

The Witness: It will, Your Honor, but they break down very quickly. The maintenance of them is extremely high.

Trial Examiner Norwood: But they are used?

The Witness: They are used, but the maintenance of them is extremely high under heavy load conditions.

By Mr. MacIntyre:

Q. Irrespective of what the reputation of a road may be, you know that many hundreds of miles of brick highways in the State of Ohio have carried heavy truck loads over them?

A. Yes; and I also know what has happened to the roads.

Q. But brick was used, nevertheless?

A. Originally.

47567 *Redirect Examination by Mr. Bond.*

47568 Q. Where you were comparing these costs, were you in each case considering cost delivered on the job?

A. Do you mean the cost of materials?

Q. Yes.

A. Yes, ready to place in the building.

Q. Now, which is it, Mr. Schultz, that decides—that you have found is the deciding factor when a person is considering a construction project, the total cost of the undertaking including labor, or the cost of materials alone?

A. I have no recollection of any case where the question of material entered into the decision. It is always on the basis of total cost, because that is what the company or person has to pay for.

47569 SMITH WILLIAM STOREY, called as a witness for the Respondents, being first duly sworn testified as follows:

Direct Examination by Mr. McFadden.

I am connected with [some] of the respondents in this proceeding. I am connected with the Trinity Portland Cement Company, Florida Portland Cement Company, Signal Mountain Portland Cement Company, Consolidated Cement Corporation.

47570 I am president of Consolidated, and have had that position, I think, since 1935.

Examination by Trial Examiner Norwood.

Consolidated has two mills, one in Michigan, Cement City, Michigan: one at Kansas, at Fredonia, Kansas.

Examination by Mr. MacFadden.

My recollection is that I said that I have been president of Consolidated since 1935. I am vice president of Florida, and have held that position, I believe, since 1927. I am not positive of the date. I am vice president of Signal Mountain, and have held that position, I believe, since 1928. I am vice president of Trinity, and have had
47571 that connection since early in 1933.

My first connection with the cement industry was in the sale of securities in relation to the financing of Signal Mountain, and after that was completed, in relation to the financing of Florida. I first became active, aside from financing, in commercial affairs in 1929. I am an executive and act in a managerial capacity in those companies. Each of the four is a separate and independent company. None is the parent of any of the others.
47572 I have been an officer of The Cement Institute, and am at present. At the time that this complaint was served, early in July 1937, I was president of The Cement Institute. I think I was elected president late in 1936, probably in December. Just prior to that, for 3 or 4 months, I believe, I had been a vice president. I have been a trustee of the Institute, and was a trustee at the time this complaint was served. I think I had been a trustee of The Cement Institute continuously since NRA days, which possibly would be late in 1933. I have been a
47573 member of Institute committees. I have been a member of the executive committee. I do not recall whether I was a member of the executive committee at the time the complaint was served. I really do not recall anything about the period that I served as a member of the executive committee, except that I suppose I have been considered a member of the executive committee as president of the Institute. I mean that ex officio I had been a member of the executive committee, but in addition to that I may have been a member of the executive committee prior to that; I do not recall. I was Chairman of the committee on contract forms early in the
47574 NRA Code days, until probably after NRA was found unconstitutional. I do not remember how long after the Schechter devision [that was]. I would say

it would have been a few months, and my recollection is that the form committee was officially dismissed along about the time that the Trade Practice Committee was dismissed. I was a member of the Trade Practice Committee. I served from the time, approximately, that NRA was found unconstitutional until perhaps 4 months later, according to my best recollection. In the early Code days, that is, the days during which the Code was being prepared, and I guess continuing for some time after it had actually been approved, I served on a committee of the industry which I believe was designated control, production and allocation. I am not sure as to the designation, but in any event there were two or three such committees composed of different people, and I served on two of
47575 of them at least. That was not merely a coincidence.

It was provided in NRA that such work could be investigated, and I believe, planned and provided the plan was submitted to the President of the United States, I believe, and received his approval, could be made effective; that was provided for as I recall in the Code.

Q. As the result of the work of any of these commitees was any so-called plan ever approved?

A. No plan was approved by the industry, and no such plan was ever presented for approval to the President.

I was a member of the Code Authority for the Portland Cement Industry for a short time just prior to the finding that NRA was unconstitutional; I would say for not to exceed 6 months, perhaps less than that.

Examination by Trial Examiner Norwood.

47576 It was a committee of the Institute that prepared the Code. I do not know [whether] I was on one of those committees. That was prepared by quite a group of people working together, and I do not know that it was ever designated a committee, but I attended some of those meetings when that was considered.

Examination by Mr. McFadden.

I believe that Consolidated was incorporated in 1926. It operates a plant at Cement City, Michigan, and operates now a plant at Fredonia, Kansas. I say that because it

at one time operated a plant at Mildred, Kansas, also, but no longer does that. The plant at Mildred,
47577 Kansas, is not being operated today. Consolidated did not build the mills that I have just listed. The annual clinker capacity of Consolidated's two mills is approximately 2,300,000 barrels. We have a sales office in Jackson, Michigan, and we have one at Fredonia, Kansas, and one in Kansas City, Missouri. Consolidated has an executive office in Chicago.

I think Signal Mountain was incorporated about
47578 1920 or 1921. It has one mill right out of Chattanooga, Tennessee. This mill began production in 1923. Its annual clinker capacity is approximately 1,600,000. Since it began production in 1923 up until the time of the complaint, in 1937, there has been a change in the capacity of that mill in that another kiln has been added, so that the company now has 3 kilns of the same size, whereas when that started they had two kilns, so I should say that the capacity is approximately half again as much as it was in the beginning. The sales office of Signal Mountain is at Chattanooga. It has an executive office in Chicago.

I think I would be guessing if I said when Florida was incorporated, but it was completed and went into operation in late 1927, October, I think. It probably was incor-
47579 porated a couple of years or perhaps 18 months earlier. The Florida plant is at Tampa, Florida. The annual clinker capacity of this mill is approximately 1,600,000 barrels. The sales office is in Tampa. It has one or two other salesmen's offices in Florida, one at Miami, one at Tallahassee, one at Jacksonville. It has executive office in Chicago.

I do not know of my own knowledge when Trinity was incorporated. It owns mills in Dallas, Fort Worth and Houston, Texas. At the time that I became connected with Trinity all 3 of these mills were operating.
47580 They were operating in 1937 at the time this complaint issued. The annual clinker capacity of these mills taken together is approximately 3,800,000. We have principal sales offices in Dallas, also have sales offices in Fort Worth and Houston. We have an executive office in Chicago. None of the 4 companies own any silos for the storage of bulk cement away from their mills.

47582 By Mr. McFadden:

Q. Will you give us some idea of the market area served by these mills? First, will you tell us the principal market of the Florida Company?

A. The principal marketing area of the Florida Company is the State of Florida.

Q. Does it make sales elsewhere?

A. Yes, Puerto Rico, the Panama Canal Zone, Virgin Islands, Haiti, Dominican Republic, Venezuela, Colombia, Mexico, rather general export business in the area that is not too far away around the Caribbean Sea.

Q. What are the principal markets of the Signal Mountain Company?

A. The principal markets of the Signal Mountain Company generally stated are the Southeastern States. Shall I name them?

Q. Yes, I think so.

Trial Examiner Norwood: I do not think it would be necessary.

Mr. McFadden: All right. The Examiner things that is sufficiently definite.

By Mr. McFadden:

Q. Where is the principal market of the Consolidated Company?

A. That is really divided into two parts. In so far as the Michigan plant is concerned, it is the Lower Peninsula of the State of Michigan, Northern Indiana, North-
47583 ern and Western Ohio, certain sales have been made at times in Illinois. In so far as the Fredonia, Kansas, mill is concerned, it is Kansas, Western Missouri, Arkansas, western part of Mississippi. I would like to correct that. I believe the Kansas mill does not undertake to sell any cement in Mississippi. Oklahoma, parts of Nebraska, parts of Texas.

Q. Where is the principal market of the Trinity Company?

A. The principal market of the Trinity Company is in Texas, Louisiana, Oklahoma, Arkansas, and they undertake to sell cement in part of Mississippi. They also do some business in the Panama Canal Zone, the Republic of Panama, and Venezuela, and Puerto Rico.

Q. In describing the sales territories of these four companies, have you told us what the marketing areas were

at the time of the complaint, or have you been thinking of the present time?

A. Well, I really was thinking of the present time, but I do not believe there have been any very substantial changes except at the time of the complaint I doubt if the Trinity Company was making sales to any foreign country or to the Panama Canal Zone or Puerto Rico.

Q. Are the four companies in competition with all of the other Respondents in this case in the sense that they offer cement for sale in the areas served by the other Respondents based upon your experience and observa-
47584 tion of what companies you find in the markets served?

A. No. In my experience I would say that not all of the other Respondents were trying to sell cement in the same marketing area where we are.

Trial Examiner Norwood: Are some of the others trying to sell cement in all of your other territory, either the one or the other?

The Witness: Well, Your Honor, I think you would have to almost break that down by companies; I mean by the individual companies of which I am an officer.

Trial Examiner Norwood: Is there any territory in which you sell that some other cement company does not offer cement?

The Witness: No, there is no such territory as that.

By Mr. McFadden:

Q. Well, has the Florida Company ever found itself selling cement in the same market with the Beaver Portland Cement Company?

A. Not so far as I know.

Q. Or with the Portland Cement Company of Utah?

A. I am sure they did not.

Q. Or the Three Forks Portland Cement Company?

47585 A. I feel sure they do not.

Q. Has the Signal Mountain Company ever found itself selling in competition with the Calvaleras Cement Company?

A. Not to my knowledge.

Q. Or the Glens Falls Portland Cement Company?

A. No.

Q. Or the Oregon Portland Cement Company?

A. I think not.

Trial Examiner Norwood: Now, the witness has already said that he sells in certain territories and you do not have to show that he is not in competition—

Mr. McFadden: I would like, Your Honor, to ask just two or three questions as to each of the other two companies.

Trial Examiner Norwood: All right.

By Mr. McFadden:

Q. Has the Trinity Portland Cement Company ever found itself selling in competition with the Lawrence Cement Company?

A. Not so far as I know.

Q. Or the Nazareth Cement Company?

A. I think not.

Q. Or the Superior Portland Cement Company, Inc., of the State of Washington?

A. They have not.

Q. Has the Consolidated Portland Cement Com-
47586 pany ever found itself competing in the same market with the Idaho Portland Cement Company?

A. No.

Q. With the Monolith Portland Cement Company?

A. I think not.

Q. With the Union Portland Cement Company?

A. Right at the moment I do not know where the Union Cement Company is.

Q. Well, you—

A. I do not know of that company, having had any competition with a Union Cement Company.

Q. It is a stranger to you, apparently, so we will pass on to something else.

What are the factors which determine the areas in which the four companies solicit business?

A. Well, in general, it is the judgment of the management as to where a profitable business can be done.

Q. Who determines the price policies of each of these four companies?

A. Generally speaking, I do.

Q. Will you state in a general way what the price policy is of each of these companies?

A. It is the general price policy of each of the companies, of which I am an officer, to offer its cement at

destination at a price and on terms and conditions
47587 that are as favorable or more favorable than other cements at the same place and at the same time.

Q. And how do you determine whether the delivered prices to be charged by any one of these four companies at any time and place might be at least as low as a competitor's price?

A. By our solicitation of the trade and our following of the activities of buyers of cement so that we learn what prices are being offered, have been offered by other cement companies.

Q. And how do you get such information?

A. We get it through our sales department principally, and through customers, prospective customers, tabulations of bids, or any any other way that we can get it.

Q. Do you try to get competitors' quotations at every point in your sales area?

A. No, we do not undertake to do that.

Q. How do you use the information that has come to you in the channels that you have just described?

A. Well, we use the information, such information as we can secure in the field as to our competitors' prices, terms, and conditions, and his general activities to determine what prices we may need to quote today or some other time in the future in the hopes that they will be at least as low as or lower than the prices that competitors have shown they have been selling cement for.

47588 Q. I think you said that some of the information comes to you through your own salesmen. What information and instructions do you give to your salesmen when they go out to solicit business?

A. Oh, we give them a territory and we give them a price list, and we ask them to keep us informed as to what is going on in that territory and undertake to sell cement at those prices.

Q. Are your salesmen authorized to exercise any independence or ingenuity in the quotation of prices?

A. No, they are not.

Q. They are required to quote the prices that appear on the price list that you have supplied them with; is that true?

A. That is correct, unless they have some advice of a change in our price that has not as yet had time to be entered on their price list by their sales manager, who instructs them in the use.

Q. Do you ever sell cement at prices that are below the prices that your salesmen have on their lists and that you publish to your trade?

A. Yes, we have done so.

47590 Q. Do you understand the question? Well, let me restate it.

I have asked you to limit your answer to the period indicated, and you had previously stated that while your salesmen are not authorized to depart from prices on the price lists which you have furnished them, that you do occasionally, or at least sometimes quote prices that are lower than the prices on those lists.

I now ask you if you have quoted such lower prices to dealers?

A. Why, I feel sure that we have done so infrequently prior to the date of the complaint.

47591 Q. Have you quoted such lower prices to contractors?

A. Confining my answer to the same period, I would say sometimes.

Q. Have you quoted such lower prices to the United States Government?

A. Applying my answer to the same period, I would say often.

Q. In describing your general price policy, I think you said that generally you sold at delivered prices. We have just been speaking about sales to the United States Government. Does that fall within your general price policy?

A. The United States Government usually, now, and I think prior to the period of the complaint, asks for prices on delivered cement, and usually an alternative price is asked at the mill, bidder's mill.

Trial Examiner Norwood: That is, they ask for mill and delivered—mill price and delivered price?

The Witness: Very frequently.

Q. I understood that reply to state what the Government had asked for. Now, will you continue and state how your companies have quoted to the United States Government?

47592 A. Well, we do now and did before the complaint was issued sell the United States Government at the mill in cases where we are interested in bidding at all, and they ask for that sort of a quotation.

Q. In quoting to the United States Government, have

any of your companies ever quoted a so-called destination cost to the U. S. Government with a so-called control clause?

A. Yes, sir.

Q. Do you recall when it was that this form of quotation was first used by any one of your four companies?

A. Is your question, do I recall when it was?

Q. Yes.

A. I think early in 1934.

Q. You have one of the four companies in mind, doubtless; which one was it?

A. I think the first time that it was ever used was in answer to a proposal of the Tennessee Valley Authority for a quantity of cement, part of which was for Coal Creek, Tenn., and part of which was for Sheffield, Ala.

Q. To the best of your knowledge, that is the first time that any one of these four companies used that method of bidding to the United States Government; is that so?

A. To the best of my knowledge, it is the first time that anyone ever used it.

Q. Why do you say that?

47593 A. Because I haven't found anybody else using it prior to that time, and we devised it in my office.

Q. Oh, you say that the method of bidding a so-called destination cost to the U. S. Government with control clause was devised in your office; is that it?

A. That is true.

Q. Did you personally have something to do with it?

A. Yes, I did, together with one or two other men in our Chicago organization.

Q. I think you stated that you have general charge of the price policies of the company?

A. Generally speaking, yes.

Q. Well, why did you devise this method of bidding? What was your aim? What was the purpose to be served by this method of bidding?

A. We wanted to sell cement at our mills, or offer to sell cement at our mills to the United States Government when they asked for mill prices, and we were interested in bidding on the particular quantity of cement involved, and because we felt that this method of bidding gave us the best chance to do a profitable business with the Government, or to do as profitable business with the Government as competition would allow us to do on sales at the mill.

Q. Did you at the same time have the practice of quoting a flat mill price to the U. S. Government?

47594 A. I do not believe at any time that we have ever engaged in such practice, any of these four companies ever bid flat mill prices. You mean what I would call an inflexible mill price?

Q. I mean a price f.o.b. your mill without regard to the destination to which the particular cement is to be taken.

A. I do not believe any of these four companies have ever so bid.

Q. Your quotation in this new form then described as cost to the U. S. Government with control clause was a way of bidding with relation to cost at destination; is that correct; Is that what the term implies?

A. Well, it implies that we selected a cost of our particular brand of cement for the work required at the destinations involved, and in our bids said to the Government in order to determine the price at our mill you shall deduct the land grant, special, or commercial freight rate, whichever is lowest, in order to arrive at a price at our mill for shipment on federal bills to the destination stated above. That may not be the exact language, but I am sure that is the sense of it.

Q. And we had spoken of so-called control clause, which part of that descriptive method of competing that you have told us would be the so-called control clause, if any?

A. Well, the part that has come to be known, at least in this proceeding, as the control clause is the part that states

47595 the Government shall make the deductions from the above named destination cost to the United States Government in order to reach a price at our mill.

Q. Have you ever quoted a so-called destination cost to the U. S. Government without some such control clause?

A. Yes, prior to N. R. A. days it was our practice to quote a mill price for shipment to a particular piece of work at a particular destination which we determined by making a deduction that during the N. R. A. we concluded the Government should make and provided for that being done.

Q. I understand by the answer you have just given that there was a time when you bid some form of mill price. You had previously told us that the new method devised by the Signal Mountain Company in 1934 was called U. S. destination cost, and I would like to know whether you ever

bid under that new method without a so-called control clause?

A. Not to my knowledge, no.

Q. Is there some significance to the control clause that ties it inseparably to the destination cost?

A. Yes, it does, because without the so-called control clause I issume that the destination cost to the United States Government that is stated might be taken for a destination price, the price on delivered cement.

Trial Examiner Norwood: Wasn't that the price on delivered cement?

The Witness: Ordinarily not, Your Honor, no.

47596 Trial Examiner Norwood: Why not?

The Witness: The price of delivered cement would be predicated in our company making delivery of it to that destination at commercial rates. The destination cost to the United States Government would ordinarily be a lower figure than that because it takes into consideration the ability of the Government to enjoy and use land-grant rates.

By Mr. McFadden:

Q. I was trying to get a simple statement of your point of view with regard to this method of bidding devised in 1934. If we take your general price policy of quoting delivered price, and then consider that another type of price is a mill price, which you say your company quoted occasionally prior to the Code, is this new method the cost to the U. S. Government with control clause still a third type of price or does it fall in one or the other of those two general classes of destination price on the one hand and f. o. b. mill price on the other?

A. No, it is an f. o. b. mill price.

47597 *Cross-Examination by Mr. Wooden.*

Q. Mr. Storey, this control clause you were just describing, and you just said it was an f. o. b. mill price, that it was an f. o. b. mill price that was tied in to a destination cost by the control clause, wasn't it?

A. Mr. Wooden, I would say that you would have to take the whole destination cost to the United States Government together, and that the control clause is a part of that method of quoting, and that in its use we say to the

United States Government the price at our mill for your shipment on federal bills of lading to this project, and to this particular destination, is a certain number of dollars and cents, less what you determine it costs you to get it there by the cheapest rate available to you.

Q. And you were estimating in advance what that rate would be in the destination cost that you figure?

A. No, I would not say that we were estimating what it would be.

Q. Well, you did not know in advance what the actual settlement rate would be between the Government and the railroad on the cement, did you?

A. Only what the railroad told us, yes.

Q. Wasn't that an estimate rather than an actuality in many cases?

A. Not as I see it; no, sir.

47598 Q. It was not your experience that many times the actual basis of the settlement with the railroad was a different figure than the one you used in making your destination cost estimate or bid?

A. Well, whether it was actual or whether it was not the amount used in the settlement, it might not have anything to do at all with the figures we use for a destination cost.

Q. Well, wasn't it your experience that frequently the actual or the—rather, I will put it this way: That frequently the rate that you used in your bid was not the actual rate on which settlement was made between the railroad and the Government?

A. We do not use any rate in our bid, Mr. Wooden.

Q. Well, what factor did you use to get the delivery cost in that destination cost?

A. We used anything that we could gather together in the way of information on past bids to the Government on the amount of money that our competitors appeared to be trying to net at their mills on sales in the general vicinity, which has been referred to as a base, or price basis.

Q. Well, you did attempt to estimate what the land-grant rate or special rate would be, didn't you, from the applicable basing point to the destination involved?

A. No, I don't think so. We asked the railroad what it was and used the information they gave us.

Q. And you found in some instance, though, that 47599 information furnished by the railroad was not actu-

ally the rate on which the shipment moved and on which settlement was made, didn't you?

A. Well, we, of course, have found that there has been a difference of—conclusion between the railroads and various departments of the United States Government as to what land-grant rate actually applied. Yes, we have found that.

Q. And you have sometimes found that the actual settlement rate was sometimes higher and sometimes lower than the one that you had learned from the railroads at the time you made your bid; is that correct?

A. Yes, frequently the Government would use rates that were either higher or lower than the rates given to us by the railroads.

Q. What were the conditions that you had experienced before devising this control clause and which you sought to remedy at the use of the control clause?

A. May I have that read, please?

Trial Examiner Norwood: Read it.

(Question read.)

A. Well, I would say primarily the differences between the railroads and the Government as to the settlement rate, land-grant rate, which would frequently result in our losing a chance at a piece of business that we had determined we were going to have a chance at.

47600 Q. In other words, you frequently found under those prior conditions your destination price or destination bid was high?

A. No, I would not say that. We would find that our destination price, our price on delivered cement, was just what we had quoted the Government because there was not any uncertainty about the commercial rates. We would find that our mill price, to which might be added the rate on which a settlement, as you put it, was made by the Government would preclude consideration for our company on a valuable piece of business with the Government.

Q. Well, do you mean by "precluding consideration," that your destination bid, or the equivalent of your destination bid would be higher than that of others?

A. No, destination bid has not anything to do with it, as I see it.

Q. Or the destination cost to the Government figured on your bid would be higher than that of some of your competitors?

A. Well, in those days, of course, there was no such thing as a destination cost as we conceived it.

Trial Examiner Norwood: Why did you lose the business?

By Mr. Wooden:

Q. That is what I am getting at.

A. Because the ultimate cost of our cement purchased at our mill laid down by the Government where they
47601 wanted to use it would be higher than we intended that cost to be.

Trial Examiner Norwood: And higher than the other fellow had bid?

The Witness: No, higher than we intended our price to be, Your Honor.

Trial Examiner Norwood: Well, would that make any difference if there was not another bid that figured out lower?

The Witness: Oh, no, it would not make any difference if that was the low bid.

By Mr. Wooden:

Q. As a matter of fact, you frequently found—

Trial Examiner Norwood: I am assuming that that was not the lower bid.

The Witness: That is true, or we would not have been precluded from—

Trial Examiner Norwood: And isn't that why you lost the business?

The Witness: Because it was not the low bid?

Trial Examiner Norwood: Yes.

The Witness: The reason we lost the business was because the bid at our mill plus the land-grant rate used by the Government would not give them as low cost on our cement as somebody else's cement.

Trial Examiner Norwood: That is what I was
47602 trying to get at.

Go ahead.

By Mr. Wooden:

Q. And this control clause was devised to meet that condition, as I understand it?

A. Oh, the control clause was devised so that we might know what the cost of our own cement on which we were willing to make a proposal to sell at our mill might be laid

down by the Government where they wanted to use it. We wanted to know what our cement cost the Government because we were in competition with other sellers, and that is the basis on which the Government made their awards.

Q. Prior to the control clause the amount paid you for cement by the Government at the mill was determined, was it not, by deducting the commercial rate of freight to the destination?

A. Not as far as these companies were concerned except in cases where possibly we wanted to bid and there were no known land-grant rates or routes.

Q. Well, in the event that you got the award and made the shipment, wasn't the amount paid to you by the Government determined by deducting the commercial rate from the destination price and paying you the balance?

A. Not at all.

Q. Do you mean that prior to the control clause you did not even bid a destination price but bid an f. o. b. mill price?

47603 A. Bid both.

Q. Prior to the control clause?

A. When the Government asked us to.

Q. And prior to the control clause when you bid both what was the relation between the f. o. b. mill price and the destination price?

A. Well, I doubt if you can compare those two things, but believing that I see what you have in mind I could answer it.

Q. All right. What is it?

A. If you mean by your question what was the relation between our proposal to furnish delivered cement and what the cost would be to the Government at the same point if they bought it at our mill and took it there themselves?

Q. Yes.

A. Ordinarily, the purchase by the Government at our mill and delivering it there themselves would give them quite a substantial lower cost.

Q. Well, but was your f. o. b. mill price the difference between your destination price and the commercial rate of freight?

A. Not at all.

Q. Well, how was your f. o. b. mill price when you bought f. o. b. mill and destination price?

A. Oh, we bid an f. o. b. mill price at our mill undertaking to make as low a cost to the Government on
47604 the cement they might purchase from our mill and take it where they wanted to use it as we estimated any other bidder might give them in the way of a comparable cost, and from that cost we deducted what we believed to be the applicable rate on which the Government would ship and quoted the Government at the resulting figure from that.

Q. Do you mean to say that before the control clause you also deducted an estimated land-grant rate from your destination price in order to get the f. o. b. mill price?

A. No, I do not mean to say that. I mean that we would deduct ordinarily the land-grant rate if a land-grant rate happened to be involved that might be given to us by the railroads, and I do not regard that as an estimated rate, or we might make our mill price after going through that computation five or ten or twenty cents less than what the result would be depending on what we thought our competition was.

Q. As I understand, at any rate prior to the control clause you never figured your f. o. b. mill price to the Government by deducting the commercial rate of freight from the regular destination price; is that correct?

A. That is my best knowledge and belief, yes.

Q. Well, now, did you ever know of any cases or any instances where the land-grant rate or the special rate to the Government was higher than the commercial rate of freight?

A. No, I do not believe I have ever known of such cases.

47605 Q. In other words, this control clause was equivalent to saying that the Government must deduct the land-grant rate or the special rate from the destination cost or figure in order to know what to bill you for f.o.b. mill?

A. Or the commercial rate, whichever was the lowest.

Q. Yes, but you just said you never knew of the commercial rate being lower than the land-grant rate or the special rate.

A. Well, I misunderstood your question, because I thought you asked me if I had ever known of land-grant rates and special rates to be higher than commercial rates.

Q. Yes, that is the same thing. Did you ever know of

commercial rates being lower than land-grant or special rates?

A. No; I do not recall it.

Q. So, then, the control clause might just as well have left off of it, whichever is lower, and said, "Deduct the amount of land grant or special rate"?

A. Not at all, because there might not be either a land grant or a special rate.

Q. Of course, they could not deduct that if there was not, of course.

A. But answering your question further, if I may, Mr. Wooden.

Q. Yes.

A. We have sold cement to the Government where the deduction has been the commercial freight rate, the first order we ever sold under this method was that kind of business.

47606 Q. How long since you have done that?

A. I do not recall any particular instances, but on the first case that was what happened.

Q. Well, how far back was that?

A. Well, it was probably in March, 1934.

Q. Do you mean you did that after the control clause was put into effect?

A. I mean we bid a destination cost to the United States Government at Coal Creek. They awarded us 45,000 barrels of cement, special cement. We made it. They bought it at the mill and we shipped it to them.

Q. And they deducted the commercial freight?

A. That is the only freight rate that there was.

Q. Oh.

A. They later, I believe, shipped the cement actually, or I believe some of it, on a special rate which was lower.

Q. There was nothing else to do in the case if there is only a commercial rate but deduct the commercial rate to get your mill price?

A. No, sir.

Q. Well, now, who assisted you in working out or devising this control clause?

A. Mr. J. B. Johnson, in my Chicago office, and Mr. A. E. Hjerpe.

Q. Did you discuss it with any one other than them 47607 before you finally worked it out in final form?

A. I feel quite sure we did not.

Q. You immediately, I take it, upon working it out, filed it with the Code Authority; is that correct?

A. That is correct.

Q. And gave notice thereby of your intention to use that on bids thereafter to which it might be applicable?

A. Gave notice thereby of our intention to use it on this particular letting.

Q. In other words, you filed it for a particular letting only; is that the way it started?

A. I rather think that is correct.

Q. And that particular letting was the first bids on T.V.A.?

A. That is my recollection of it.

Q. And your bids on that occasion, with the control clause, were effective only on five days, five days after filing; is that correct?

A. As I recall, the provision of the Code was that you could not use it until after they had been on file for five days.

Q. And in other words, your use of the control clause, you gave five days' notice of that through the Code Authority?

A. Well, we did not give notice ourselves at all. We filed as provided in the Code of Fair Competition, the price quotation that we intended to use.

Q. Accompanied by the control clause?

47608 A. Yes, it was accompanied by that.

Q. You said that it was quite frequent that you made lower delivered prices to the United States Government than you did to commercial buyers; that is correct, isn't it?

A. I do not recall the question being stated in that way. What I intended to say, I am sure, was that we quite frequently, in fact often, many times, much of the time, sell to the United States Government on such a basis, that the cost of their cement at destination is less than the price shown on the salesmen's list.

Q. Yes, and the salesmen's list represents commercial prices at destination?

A. On delivered cement.

Q. If there were no special or land-grant rates involved then I take it it has been your policy to make the same delivered price to the Government as to commercial buyers; is that correct?

A. No, that is not always correct.

Q. Well, since the control clause was put into use in 1934 has that been your practice or policy?

A. No, I would not say so.

Q. In cases where you haven't used the control clause at all, how did you determine your price to the Federal Government?

A. Oh, we determined the price to quote to the Federal Government at destination that we felt would be as
47609 low as or lower than the price of any competitor that we might expect to bid.

Q. I am taking the cases out of the picture now where the control clause was used or where land-grant rates were used. Let's broaden it to that extent, and then ask you how you determined your destination price or your price to the Federal Government?

A. My answer remains the same. The instance that I have in mind is a case just such as you have in mind, where there are no land-grant rates.

Q. Prior to July, 1937, what was your policy in cases where there was no land-grant rates involved, no control clause involved with reference to whether you made or attempted to make the same delivered price to the Government that you were making at the time to commercial buyers?

A. It is a long question. May I have it read it again, please?

Trial Examiner Norwood: Read it.

(Question read.)

A. Well, I would say that our policy would be determined on each individual invitation that we had from the Government.

Q. But you mean to say that you did not have any policy during that period and under those conditions that I asked you about?

A. No, I do not mean to say that. I still mean to say that it was our general policy to undertake to offer
47610 our cement to the United States Government at a cost that would be as low or lower than any other expected bidder.

Q. And in the event there was no land-grant rate involved and no control clause involved, how did you go about determining or arriving at that destination price?

A. Ordinarily, just by quoting them a price on delivered cement.

Q. And was that delivered price in such cases and under such circumstances the equivalent of your regular commercial destination price?

A. Sometimes it would be and very frequently it would not be.

Q. In cases where it was not, how did you go about determining what it should be?

A. Using our best judgment as to what kind of a delivered price we should quote the Government in the expectation of selling them some cement.

Q. And without any land-grant rates being involved, what did you have to go on except your commercial delivered price at the destination?

A. Well, we would have the tabulations of other bids where competitors had sold the United States Government on a comparable basis, which might lead us to believe that on this particular letting in order to be in the running or be low that we would have to bid lower than they did the last time.

Q. Isn't it a fact, Mr. Storey, that in cases where
47611 no land-grant rates were involved, no control clause was involved, and you bid a destination price to the Government, that ordinarily that destination price was your commercial destination price at the same destination?

A. Well, it is a little bit difficult for me to separate the inquiries that we have had from the United States Government's various departments and say certain of them occurred before 1937 when this complaint was filed and the rest of them since. Taking them all as a whole, I would say no, that in a very great many cases we sold them at prices less than that.

Q. You do not mean to include in your answer cases where the Government deducted the commercial rate, and then, by using its own special rates, was enabled to get the cement to the particular destination at less than your commercial delivered price?

A. I do not, because I do not believe we ever sold them in that way.

Q. Now, you testified that your four companies have infrequently quoted delivered prices to dealers below your regular delivered prices. How infrequently was that done prior to July, 1937?

A. I don't think I could speak with any degree of definiteness. I feel sure in my own mind that it has been done, and that it has not been frequent, during that period.

Q. Can you name any particular dealers who re-
47612 ceived such a special delivered price?

A. No, I do not have in mind any particular dealers.

Q. Can you say whether the number of such dealers receiving such special delivered prices was as large as 3 percent of your total number of dealers?

A. No; I feel reasonably sure that it was not anything like that, figured in percentage.

Q. Can you say whether or not the volume of your dealer business represented by such specially low prices represented as much as 3 percent of the volume of your dealer business?

A. I don't believe it would.

Q. Now, in the case of contractors, what percentage of the number of your contractors prior to July, 1937, received special prices below your regular delivered prices?

A. I never tried to work it out; so I have no idea.

Q. Well, would the percentage be any substantially different than what you gave a moment ago in the case of dealers?

A. Well, yes; both percentage figures that you referred to, I think, would be quite a lot higher.

Q. Would you say that as much as 10 percent of the number of your contractors received such special concession?

A. No, I would not say that.

Q. Would you say that as much as 10 percent of your contractor business was represented by such concessions?

A. Well, I won't say, because I think it would be
47613 just a guess.

Q. Well, I want an estimate, of course, but I want an informed estimate. Put it to the point where you feel sure it would be within the facts. Do you think it might go as high as 10 percent of the volume of your cotractors' business?

A. Do you mean to include in that Government business or not? Is that contract business in your definition of contractor business?

Q. Well, I am referring to cases where you sold to contractors, of course, and not what you sold to somebody on which the contractor then worked.

A. I do not think I could give you a very clear idea of what it would average, because in one year it might be

quite a high percentage and in another year it might be a considerably lower percentage, and one large contract may so change it that—

Q. Would you say that there was any year that you have in mind where the volume of your contractor business represented by such prices was as much as 10 percent—of the contractor business, I mean?

A. Yes; I would say that some of these companies during some of the years there would be times when it has been as much as 10 percent.

Q. How about the years between 1933 and 1937? In any of those years had any of your companies showed 10 percent of your contractor business, in volume, done at special prices?

47614 A. Between what years?

Q. Between 1933 and 1937.

A. I would doubt that in those particular years there had been any such percentage.

Q. Now, as to these salesmen's price lists, which I understand you give to your salesmen, without any discretion to depart from them, how are those price lists made up?

A. They are made up in our various sales offices, under the direction of the sales manager, who works under my direction principally.

Q. Are there not those destination prices in those salesmen's price lists ordinarily the equivalent of some basing price, plus freight, from some basing point?

A. I would say that ordinariiy—I will put it in another way, that in the large majority of cases the delivered prices so used by a salesman from his lists were the result of our so-called base plus freight rate having made a lower price than had theretofore existed in that particular town, or that it was a price that met the prices that others had quoted in such towns that were lower than our destination prices.

Trial Examiner Norwood: Will you read that question and I will ask the witness to answer it.

(Question read)

Trial Examiner Norwood: Are they, or not?

47615 The Witness: I do not feel, Your Honor, that I can answer that "yes" or "no," because I do not accept the term "base price." I am willing to call it "price base."

Trial Examiner Norwood: Well, substituting your term for his, can you answer it "yes" or "no"?

The Witness: I would say in the majority of cases they are.

By Mr. Wooden:

Q. Which of your mills were price-basing points prior to July, 1937?

A. The Florida mill was, the Houston mill was, and the Fort Worth mill was. That is all.

Q. But even as to the others, the Signal Mountain and Consolidated, their delivered price list used by salesmen were ordinarily the equivalent of some price base plus freight from that price base; is not that correct?

A. During what period?

Q. Prior to 1937.

A. Well, I would say ordinarily the majority of them would be that, but in certain years, at certain times, there might be a majority of them that would not be that.

Q. And there are certain areas and certain localities that have been characterized by so-called arbitrary prices?

A. Yes; there are some of them.

Q. When would you say that the majority of your Consolidated and Signal Mountain delivered prices were 47616 not the equivalent of some price base plus freight?

A. Well, the period that I have in mind, although I do not know that I could tell you the date on which it is true, would be when there were so-called arbitrary bases found to be used in the seaboard towns, such as Savannah, Charleston, et cetera.

Q. You mean outside of the arbitrary areas, arbitrary price areas, at ports and areas covered by port prices, the remaining prices were the equivalent of some price base plus freight?

A. You mean our prices?

Q. Yes.

A. Well, if that is what we found in the way of competition at those points, and we could not get the destination price that would base on our own mill, if we had such a base mill, yes.

Q. Where you did not have a base mill, nevertheless those delivered prices were the equivalent of some base price plus freight?

A. Where we did not have a mill to reflect destination prices it would be our policy to sell our cement at the best price that we could get, which would be the lowest price somebody else would want to take at destination, and

ordinarily you could trace that back to somebody's base; yes.

Q. Now, you testified on direct that you did not get prices at all delivered points in working out these
47617 price lists. Is it not a fact that you did get them at enough points to determine whether there is a certain price base at some mill in effect, and then apply that to the other points, to get your destination prices?

A. No, sir; we get enough prices to determine whether a so-called price base has been in effect, and, as I see it, we are always looking at something that happened yesterday. We can tell what anybody, any competitor, may be trying to get as a net at his mill yesterday, but not today or tomorrow.

Q. Your only objection is to my use of the present tense in that question instead of the past?

A. My only objection is that you contemplate that I know what they are, and I do not.

Q. You try to keep up to the latest information you can get, anyway; it may have been yesterday or this morning, but you try to get the latest information from the field?

A. Oh, sure, we try to keep informed.

Q. When you list prices or quote prices at destinations where you have not picked up the information right at those points, you assume that the base that is reflected there will also be reflected at other points; do you not?

A. We assume that the base that was reflected would have been reflected at other points yesterday; yes.

Q. And you continue to assume that until you get information to the contrary, do you not?

47618 A. Unless we get information to the contrary, or unless we have other information which is unrelated to anybody's base that makes us realize that someone is quoting, cement into that town lower than we are.

Q. You testified, Mr. Story, that you tried to make your delivered prices as favorable, or more so, than competitors.

Mr. McFadden: Did you so testify, Mr. Storey?

Mr. Wooden: That is the way I noted it.

The Witness: I may have said that or I may have said as low as or as lower than. It is the same thing.

Trial Examiner Norwood: Yes, he testified to that general effect.

Mr. McFadden: That is what I thought you said—as low as or as lower than. The whole thing is what you said.

Trial Examiner Norwood: Go ahead.

Mr. McFadden: All right.

By Mr. Wooden:

Q. Now, building up these salesmen's price lists as you have just described was an attempt on your part, was it not, to make your prices as low as but not lower than those of your competitors?

A. No; I do not think that is at all true. May I explain why?

Q. Can you cite any instance where you tried to
47619 make them lower?

A. I can cite instances where we have made them lower.

Q. In making up these price lists, as you have described them, can you point out where you tried to make them lower than your competitors' delivered prices?

A. I can point out where we tried and where we succeeded.

Q. In making up the price list?

A. Certainly.

Q. Then, these price lists—how do you reconcile that with your statement that these price lists ordinarily do represent some base price plus freight?

A. Well, in the instance I have in mind, that is what it represents. May I explain it?

Q. Yes; I will be glad to have you explain it.

A. When our Florida mill came into operation, we established about the amount of money that we felt would be reasonable for us to try to receive on sales of our cement; that is, either a base or a so-called price base. The application of that reduced prices in Florida practically all over the State; so that in that case they made the price at delivery points lower than they had theretofore been.

47623 Mr. Schofield: No objection.

(COM. EX. 3267 C, 3267 D was offered and received in evidence.)

47625 Washington, D. C.,
Wednesday, October 30, 1940.

47628 It is hereby stipulated and agreed that Adam J. Miller, sales manager of The Green Bag Cement Company of Pennsylvania (hereinafter referred to as "Green Bag Pennsylvania" or "the Company") shall be deemed to have given testimony in this proceeding as follows:

1. Green Bag Pennsylvania was incorporated under the laws of the State of Pennsylvania in 1929.

47629 2. The principal office of the company is in Pittsburgh, Pa.

3. The Company sells the product of the cement mill which is located at Neville Island, Pennsylvania, and which it owned and operated by Pittsburgh Coke & Iron Company, a Pennsylvania corporation. The company is wholly owned by Pittsburgh Coke & Iron Company and acts as sales gent. The Company solicits business in a territory which reaches north and west as far as Cleveland and southeast as far as the District of Columbia.

4. The Company sells cement to agencies of the Federal and State Governments, to private consumers, including contractors, and to building material dealers having retail outlets. Approximately 65 percent of its sales, by volume, are made to building material dealers.

5. The Company sells in competition chiefly with the Medusa, the Lehigh, the Columbia Cement Division of the Pittsburgh Plate Glass, the Alpha, the Diamond, the Standard, the Huron, the Lone Star, the Capitol, the North American, the Universal, the West Penn, and the Bessemer companies.

6. The Company has never at any time agreed with any competitor to use or employ any particular system or method of pricing or marketing.

7. The Company has never at any time agreed with any competitor to quote the same price as such competi-

47630 tor for cement, at any place, or to any customer, or to make the same bid for any public contract.

47631 It is hereby stipulated and agreed that Lester T.

47632 Sunderland, president of the Respondent Company, the Ash Grove Lime & Portland Cement Company (hereinafter referred to as the "Company") shall be

deemed to have given testimony in this proceeding as follows:

1. The Company was incorporated under the laws of the State of Maine in 1907.

2. None of the officers or directors of the Company now is, or ever has been, so far as is known, connected with any other cement company.

3. The principal office of the Company is in Kansas City, Mo. The Company also maintains sales offices in Omaha, Nebraska, and Oklahoma City, Okla. The Company has no warehouses, silos or distributing points other that at its plant.

4. All cement sold by the Company is manufactured at its mill at Chanute, Kansas. The Company's plant is situated in close proximity to its deposits of raw materials. The first cement was manufactured in Chanute, Kansas in 1908.

5. The capacity of the Company's plant is 1,750,000 barrels. The Company manufactures standard Portland cement, high early strength cement, and special cements as required by the Government or other customers, all of which are marketed under its own brand name.

6. The Company sells to dealers, contractors, the United States Government and State Governments, counties, rail roads, water power and water supply developments, 47633 flood control and irrigation projects, concrete and cement product manufacturers, and concrete mixing plants.

7. The Company's dealers are and have always been the primary outlet for its product. Dealers selected by the Company carry a general line of building materials as well as cement. The Company does not sell its product at retail.

8. In its marketing area the Company comes into competition with the Lone Star Cement Corporation, the Marquette Cement Manufacturing Company, the Oklahoma Portland Cement Company, the Consolidated Cement Corporation, the Lehigh Portland Cement Company, the Monarch Cement Company, the Northwestern States Portland Cement Company, the Universal Atlas Cement Company, the Alpha Portland Cement Company, the Dewey Portland Cement Company, the Nebraska Portland Cement Company, the Missouri Portland Cement Company, the Hawkeye Portland Cement Company, and the Penn-Dixie Cement Company.

9. The Company travels salesmen in all of the territory in which it regularly solicits business. The Company covers its sales area with twenty-one salesmen.

10. The Company has never at any time agreed with any competitor to employ any particular system or method of pricing or marketing.

11. The Company has never at any time agreed with any competitor, expressly or impliedly, directly or indirectly, to quote the same price as such competitor
47634 for cement, at any place, or to any customer, or to make the same bid for any public contract. In all instances where the price or bid of the Company has been the same as the price or bid of any of its competitors, such identical prices or bids have been due solely to the fact that they were figured in the same way and they have not been due to any agreement or understanding, express or implied, between the Company and any of its competitors.

This stipulation relating to testimony of E. A. Dufford, Sales Manager of the Idaho Portland Cement Company, is subject to the following conditions:

47636 It is hereby stipulated and agreed that E. A. Dufford, sales manager of the Idaho Portland Cement Company (hereinafter referred to as the "Company") shall be deemed to have given testimony in this proceeding as follows:

1. The Company was incorporated under the laws of the State of Idaho. There are issued and outstanding at the present time 4,564 shares of preferred stock of the par value of $100 per share, and 5,277 shares of common stock of no par value. There are no bonds or other securities issued and outstanding.

2. The preferred stock of the Company is owned by 114 separate stockholders and the common stock is owned by 115 separate stockholders. So far as known, none of the stockholders have any connection with any other cement company.

3. The directors of the Company are:

Eugene Enloe.
C. E. Smith.
C. E. Alexander.
Knute Engdahl.
D. B. Heil.
W. H. Murgittroyd.
47637 Raymond Enloe.

None of said directors now is or ever has been, so far as known, connected with any other cement company. A majority of said directors have been directors of the company for more than ten years past.

4. The officers of the Company are:

Eugene Enloe, President.
W. H. Murgittroyd, Vice-President.
Raymond Enloe, Secretary-Treasurer.
D. B. Heil, Assistant Secretary.

None of said officers now is or ever has been, so far as known, connected with any other cement company.

5. The principal office of the Company is in Inkom, Idaho. The company has no branch offices.

6. All cement sold by the company is manufactured at Inkom, Idaho, where its manufacturing plant and deposits of raw materials are located. This mill has a capacity of 300,000 barrels per annum. The Company manufactures standard Portland cement and high early strength cement, all of which is marketed under its own brands.

The Inkom mill first manufactured cement in 1929. The principal marketing area of the company is in the State of Idaho, although a small amount of cement is marketed through dealers in Wyoming, Montana, and Utah. In addition, the Company has bid on municipal, county, State, and federal projects at times in those States, depending upon the attractiveness of the business. The Company covers its sales area by one salesman located at Inkom, Idaho.

47638

7. The Company does not sell its products at retail. Approximately 90 percent of the company's output is marketed through dealers. Dealers selected by the Company must carry a general line of building material as well as cement. It is the sales policy of the Company to sell only to dealers, the United and State Governments, railroads, and contractors.

8. The Company's cement is sold in competition with the following:

Portland Cement Company of Utah, Salt Lake City, Utah.
Monolith Portland Cement Company, Monolith, Calif.
Union Portland Cement Company, Devil's Slide, Utah.
Three Forks Portland Cement Company, Trident, Mont.
Oregon Portland Cement Company, Oswego and Lime, Ore.

Monolith Midwest Portland Cement Company, Laramie, Wyo.

9. The Company joined the Institute in November, 1933, after the passage of the National Industrial Recovery Act.

10. The Company has never at any time agreed with any competitor, either expressly or impliedly, di-
47639 rectly or indirectly, to use or employ any particular system or method of pricing or marketing.

11. The Company has never at any time agreed with any competitor, either expressly or impliedly, directly or indirectly, to quote the same price as such competitor for cement, at any place, or to any customer, or to make the same bid for any public contract; and in all instances where the price or bid of the Company has been the same as the price or bid of any of its competitors, such identical prices or bids have been due solely to the fact that the Company and such competitors figured their prices or bids in the same way, and they have not been caused by any express or implied agreement or understanding between the Company and any of its competitors.

12. On September 3, 1932, I became sales manager of the Company. From February 26, 1930, to September 2, 1932, J. B. Maxfield was employed by the company as general manager and during that time he had charge of sales matters. J. G. Doerr has never been connected with the Company. From July 24, 1928, to February 26, 1930, E. J. Simons was president and manager of the Company. N. J. Dolph was a member of the board of directors from April 9, 1929, to the date of his death on April 8, 1935. Eugene Enloe has been president of the Company from February 26, 1930, to the present time.

47641 It is hereby stipulated and agreed, that George N. Short, sales manager of the Three Forks Portland Cement Company (hereinafter referred to as
47642 "Three Forks") shall be deemed to have given testimony in this proceeding as follows:

1. The Three Forks Portland Cement Company was incorporated under the laws of the State of Montana on March 29, 1907.

2. The principal office of Three Forks is in Denver, Colo. The Company also maintains branch offices in Butte, Mont.

3. Three Forks sells the product of the cement mill which is located at Trident, Mont., and which is owned

and operated by Ideal Cement Company, a Colorado corporation, and markets such product in the area consisting of Montana, Western North Dakota and Northwestern Wyoming. Some sales are also in South Dakota and Idaho.

4. Three Forks sells cement to agencies of the Federal and State Governments, to railroads, to large mining and power companies and to dealers having retail outlets. Approximately 80 percent of the Three Forks sales, by volume, are made to dealers.

5. Three Forks sells in competition chiefly with the following: Spokane, Lehigh, Washington-Idaho Lime Products Company, Idaho, Monolith Portland Midwest, South Dakota, Northwestern States, Universal Atlas and Huron.

6. Three Forks has never at any time agreed with any competitor to use or employ any particular system or method of pricing or marketing.

47643 7. Three Forks has never at any time agreed with any competitor to quote the same price as such competitor for cement, at any place, or to any customer, or to make the same bid for any public contract.

8. The directors of Three Forks are C. Boettcher, C. K. Boettcher, R. J. Morse and A. E. Humphreys. The directors of Ideal are C. Boettcher, C. K. Boettcher, R. J. Morse, Robert S. Gast, Charles Boettcher, II, Adolph Coorse, Jr., and A. E. Humphreys. The officers of Three Forks are C. Boettcher, president and treasurer; C. K. Boettcher, vice-president, and R. J. Morse, secretary. The officers of Ideal are C. Boettcher, president; C. K. Boettcher, vice-president and treasurer, and R. J. Morse, vice-president and secretary.

47645 It is hereby stipulated and agreed that O. B Gilson, sales manager of the Union Portland Cement Company (hereinafter referred to as "Union") shall be deemed to have given testimony in this proceeding as follows:

1. The Union Portland Cement Company was incorporated under the laws of the State of Utah on February 24, 1906.

2. The principal office of Union is in Denver, Colo. The Company also maintains branch offices in Ogden, Utah, and Salt Lake City, Utah.

3. Union sells the product of the cement mill which is

located at Devil's Slide, Utah, and which is owned and operated by Ideal Cement Company, a Colorado corporation, and markets such product in the area consist-
47646 ing of eastern Nevada, southwestern Wyoming, southeastern Idaho, and Utah.

4. Union sells cement to agencies of the Federal and State Governments, to railroads, to large mining and power companies, to contractors and to dealers having retail outlets. Approximately 60 percent of the Union sales, by volume, are made to dealers.

5. Union sells in competition chiefly with the following: Idaho, Oregon, Portland of Utah, Monolith, Portland Midwest, Calaveras, Cowell, Pacific, Santa Cruz, Yosemite, Monolith, Colton, Southwestern, and Riverside.

6. Union has never at any time agreed with any competitor to use or employ any particular system or method of pricing or marketing.

7. Union has never at any time agreed with any competitor to quote the same price as such competitor for cement at any place, or to any customer, or to make the same bid for any public contract.

8. The directors of Union are C. Boettcher, C. K. Boettcher and R. J. Morse. The directors of Ideal are C. Boettcher, C. K. Boettcher, R. J. Morse, Robert S. Gast, Charles Boettcher, II, Adolph Coorse, Jr., and A. E. Humphreys. The officers of Union are C. Boettcher, president and treasurer; C. K. Boettcher, vice-president, and R. J. Morse, secretary. The officers of Ideal are C. Boettcher, president; C. K. Boettcher, vice-president and
47647 treasurer, and R. J. Morse, vice-president and secretary.

47648 It is hereby stipulated and agreed that Harry F. Jennings, president of the Wabash Portland Ce-
47649 ment Company (hereinafter referred to as "Wabash") shall be deemed to have given testimony in this proceeding as follows:

1. Wabash was incorporated under the laws of the State of Indiana in 1899.

2. The officers of Wabash are: Harry F. Jennings, president and treasurer; James T. McMillan and John W. Watling, vice-presidents; H. R. Currie, secretary and assistant treasurer. None of said officers now is or ever has been, so far as is known, connected with any other cement company.

3. The principal office of Wabash is in Detroit, Mich. The company maintains a branch sales office in Cincinnati, Ohio.

4. All standard Portland cement sold by Wabash is manufactured at its two mills, which are located at Osborn, Ohio, and Stroh, Ind., where deposits of raw materials are also located. The mills have a capacity of 2,500,000 barrels per annum. Wabash manufacturers standard Portland cement as well as special cements required on large Government projects, all of which are marketed under its own brand.

The first cement was manufactured in 1899. The principal marketing area of Wabash is Michigan, Ohio, Indiana, a small part of southern Illinois, Kentucky, West Virginia, and part of western Pennsylvania.

5. The sales policy of Wabash is to sell only to dealers, the United States and State Governments, counties,
47650 railroads, water supply, water power, flood control, and irrigation projects, contractors, concrete and cement products manufacturers, and concrete mixing plants. Wabash does not sell its products at retail. Dealers selected by it must carry a general line of building material as well as cement. Approximately 57 percent of the Wabash output is marketed through dealers. Wabash covers its sales area at the present time by 17 salesmen who are located at points scattered through the sales area.

6. Wabash cement is sold in competition with the following:

The Huron Portland Cement Company.
The Petoskey Portland Cement Company.
The Peerless Cement Corporation.
The Consolidated Cement Corporation.
The Wolverine Portland Cement Company.
The Aetna Portland Cement Company.
The Universal-Atlas Cement Company.
The Lehigh Portland Cement Company.
The Marquette Cement Manufacturing Company.
The Lone Star Cement Corporation.
The Louisville Cement Corporation.
The Kosmos Portland Cement Company, Inc.
The Medusa Portland Cement Company, Inc.
The Alpha Portland Cement Company, Inc.
47651. The Standard Portland Cement Company, Inc.
The Diamond Portland Cement Company.

The Pittsburgh Plate Glass Company.
The Superior Cement Corporation.
The Green Bag Cement Company of Pennsylvania.
The Bessemer Limestone & Cement Company.
The Southwestern Portland Cement Company.
The Signal Mountain Portland Cement Company.
The Hermitage Portland Cement Company.
The Pennsylvania-Dixie Cement Corporation.
The Missouri Portland Cement Company.

7. Wabash has never at any time agreed with any competitor, either expressly or impliedly, directly or indirectly, to use or employ any particular system or method of pricing or marketing.

8. Wabash has never at any time agreed with any competitor, either expressly or impliedly, directly or indirectly, to quote the same price as such competitor for cement, at any place, or to any customer, or to make the same bid for any public contract; and in all instances where the price or bid of Wabash has been the same as the price or bid of any of its competitors, such identical prices or bids have been due solely to the fact that Wabash and such competitors figured their prices or bids in the same way, and they have not been caused by any express or implied agreement or understanding between Wa-
47652 bash and any of its competitors.

47653 It is hereby stipulated and agreed that Gales M. Bell, secretary and treasurer of the Spokane Port-
47654 land Cement Company shall be deemed to have given testimony in this proceeding as follows:

(1) The Respondent Spokane Portland Cement Company is a corporation organized under the laws of the State of Washington on or about the 5th day of February, 1937.

(2) Respondents' Exhibit 3412, for identification, is a certified copy of the Articles of Incorporation of the Respondent Spokane Portland Cement Company.

(3) On or about the 5th day of May, 1937, the Respondent, Spokane Portland Cement Company, acquired by purchase and became the owner of the property, business and assets, except cash on hand, of the International Portland Cement Company, Limited, a corporation organized and doing business under the laws of the State of Washington. In payment therefor this Respondent issued 28,030 shares of its capital stock to the said International Company. Prior to said purchase, this Respondent was not engaged

in the manufacture, production or marketing of Portland cement.

(4) Respondents' Exhibit 3413, for identification, is a certified copy of the certificate of purchase by the Respondent, Spokane Portland Cement Company of the assets of International Portland Cement Company, Limited.

(5) On or about the 21st day of September, 1910, a corporation known as the International Portland Cement Company, Limited, was organized under the laws of the
47655 State of Washington for the purpose of manufacturing and marketing cement.

(6) Respondents' Exhibit 3414, for identification, is a certified copy of the Articles of Incorporation of the International Portland Cement Company, Limited.

(7) The International Portland Cement Company, Limited, changed its name to the Spokane Portland Cement Company on or about the 2nd day of May, 1932, by amendment to its Articles of Incorporation duly and regularly filed according to law in the office of the Secretary of State.

(8) Respondents' Exhibit 3415, for identification, is a certified copy of the Amended Articles of Incorporation of the International Portland Cement Company pursuant to which its name was changed to Spokane Portland Cement Company.

(9) Thereafter, this original corporation, the Spokane Portland Cement Company, changed its name back to its original name, the International Portland Cement Company, Limited, on or about the 13th day of February, 1937, by amendment to its Articles of Incorporation duly and regularly filed according to law in the office of the Secretary of State.

(10) Respondents' Exhibit 3416, for identification, is a certified copy of the Amended Articles of Association of the Spokane Portland Cement Company, pursuant to which its name was changed to International Portland Cement Company, Limited.

(11) On or about February 1, 1937, the Spokane
47656 Portland Cement Company executed a letter of consent to the use of the name Spokane Portland Cement Company by a new corporation to be formed during February, 1937.

(12) Respondents' Exhibit 3417, for identification, is a certified copy of the letter of consent concerning the use of the name Spokane Portland Cement Company.

(13) The International Portland Cement Company, Limited, commenced proceedings for its voluntary dissolution on the 14th day of May, 1937, pursuant to the laws of the State of Washington. These dissolution proceedings were terminated on the 29th day of November, 1937, at which time the trustee's certificate of final dissolution of the International Portland Cement Company, Limited, was filed in the office of the Secretary of State.

(14) Respondents' Exhibit 3418, for identification, is a certified copy of the certificate of final dissolution of International Portland Cement Company, Limited.

(15) By way of final liquidating dividend, the said International Company distributed to common stockholders $1.50 for each share of common stock of the said International Company and to preferred stockholders two shares of the capital stock of the Respondent Spokane Portland Cement Company for each share of preferred stock of the said International Company.

(16) The Respondent Spokane Portland Cement Company, on or about the 5th day of May, 1937, became
47657 engaged in the production and sale of cement, and, by virtue of the purchase of the assets, property and business of the International Portland Cement Company, Limited, became the owner of one mill located at Irvin, Spokane County, Washington. It retained and employed the same management and personnel previously employed by the said International Company.

(17) The Respondent Spokane Portland Cement Company has never at any time agreed with any competitor to use or employ any particular system or method of pricing or marketing.

(18) The Respondent Spokane Portland Cement Company has never received freight rate books from The Cement Institute.

(19) The Respondent Spokane Portland Cement Company has never cooperated with the statistical service of the Cement Institute.

(20) The original Spokane Portland Cement Company became a member of The Cement Institute in the month of June, 1933, and paid dues to and including dues for the month of December, 1936. The Respondent Spokane Portland Cement Company paid dues to The Cement Institute assessed against the original Spokane Portland Cement Company for the month of January, 1937, and there-

after paid dues assessed against the International Portland Cement Company, Limited, following the change of name of the original Spokane Portland Cement Company
47658 to International Portland Cement Company, Limited, for the months of February, March, and April, 1937. Thereafter, the Respondent, without formal application for membership in The Cement Institute, continued to pay dues for the months of May to September, 1937, inclusive. The Respondent Spokane Portland Cement Company has paid no dues to The Cement Institute since those paid for the month of September, 1937.

(21) On or about the 1st day of March, 1938, in order to clarify its position, the Respondent Spokane Portland Cement Company formally resigned from The Cement Institute.

(22) Respondents' Exhibit 3419, for identification, is a document which was received by the Spokane Portland Cement Company from the Department of the Interior, Office of Indian Affairs.

47660 It is hereby stipulated and agreed that T. K. Partridge, sales manager of the Victorville plant of the Southwestern Portland Cement Company (hereinafter referred to as "Victorville" or as the "Company") shall be deemed to have given testimony in this proceeding as follows:

(1) I became associated with the company as a salesman in 1917. For the nine years next following, at one time or another, I covered, as a salesman, all of the territories in which the Victorville plant marketed its products. In 1926, I was made sales manager of the Victorville plant, which position I have retained to the present time. From 1907 to 1917, I was employed by the Kansas City, Mexico and Orient Railroad and, from 1912 to 1917, I was general agent in charge of the traffic department office of this railroad at El Paso, Texas.

(2) In order to sell its standard Portland cement, the Victorville plant must meet the lowest price at which any competitor has offered similar cement at the destination in question.

47661 (3) The Victorville plant has found that price reductions and secret price concessions do not increase the volume of sales of Victorville products because competing cement manufacturers meet lower prices as soon as advised thereof and customers continue to purchase from their regular sources of supply.

(4) From time to time salesmen of the company have reported advice from dealers that competitors have offered to sell them cement at prices lower, by varying amounts, than the last known publicly quoted prices at the respective destinations in question. Friendly dealers of the company call our Los Angeles office direct and report price concessions offered them by our competitors. Such information usually reaches our office within a few hours after the concession has been made.

(5) During the existence of the National Industrial Recovery Act, the Victorville plant abided by the provisions of the Code of Fair Competition for the Portland Cement Industry which had been approved by the President of the United States because it understood that the terms of this Code were prescribed by law. Such compliance involved no major changes but some minor ones from practices which had been followed at Victorville for some years prior to 1933.

(6) The Victorville plant has never been a party to any agreement or understanding with any of its competitors relating to the manner in which prices for its 47662 cement were arrived at or calculated.

(7) The Victorville plant has at all times been free to quote and sell its products at any price acceptible to it. With the exception of joint bids and joint contracts resulting therefrom, the Victorville plant has never had any understandings or agreements with any of its competitors relating to prices.

(8) About 1925 we found that The Riverside Company had quoted delivered prices at points in Arizona.

(9) The Victorville plant publishes lists of prices on its cement and distributes these lists to its customers by way of advising them of its prices. This plant has determined that in the area where it markets its cement the distribution of price lists has definite advertising value and impresses customers more than individual quotations.

(10) The Victorville plant has never had any understanding or agreement with any of its competitors relating to qualifications required of its customers or relating to classes of customers to whom it would sell direct.

(11) The Victorville plant has never had any agreements or understandings with any of its competitors relating to the use of methods of delivery or charges therefor.

(12) The Victorville plant produces standard Portland, high early strength, low heat, waterproof or hydro-plastic, sulphate resistant and oil well cements.

47663 (13) Victorville has never had an agreement or understanding with any of its competitors to the effect that it would or would not improve the quality of its cement, that it would or would not increase the number of different cements it would produce, that any specifications would or would not be followed, or that any cements should or should not contain specific raw materials or specific quantities of raw materials.

(14) The terms and conditions of sale on which the Victorville plant has marketed its cement have always been arrived at by the independent action of the Victorville plant solely with regard to the best interests of this plant.

(15) The Victorville plant has never regarded The Cement Institute as any agency for the interpretation of Victorville's policies or for the formulation of policies by which the Victorville plant was to be governed.

47665 It is hereby stipulated and agreed that C. C. Merrill, vice-president and general manager of the Southwestern Portland Cement Company (hereinafter referred to as "Victorville" or as the "Company") shall be deemed to have given testimony in this proceeding as follows:

(1) The site of the Victorville plant of the company was selected with careful regard for close proximity to raw materials required in the manufacture of its product, available water supply and adjacent markets for the sale of its products. The Victorville plant is located on the Atchison, Topeka and Santa Fe Railroad and on the Union Pacific Railroad.

(2) The Victorville plant was built in 1915 and has been kept modern and up to date by constant maintenance and addition of mechanical and technological improvements to reduce costs and to improve the quality of its products.

(3) The productive capacity of the Victorville
47666 plant has been directly expanded by installation and larger mechanical units prior to 1928. In 1928 and 1936 the Victorville plant produced and shipped over 1,000,000 barrels by operating at practical capacity.

(4) The company is not affiliated with any other ce-

ment manufacturing company. None of the officers or directors of the company is an officer or a director of any other cement manufacturing company.

(5) The extent of territory in which the Victorville plant markets its products depends upon the volume of business available in markets close to the mill and in markets at some distance from the mill, the cost of securing orders, the cost of transportation, the net realization at the mill, the service Victorville is able to render in comparison with the service offered by competing companies and the prospective value to the company of customers in a given market. At present Victorville products are sold in central and southern California, southern Nevada, western Arizona and the Hawaiian Islands.

(6) In the area where the Victorville plant markets its cement it has to meet the competition of nine cement plants in California, two cement plants in Utah, and two cement plants in Colorado.

(7) The Victorville mill markets some cement in northwestern Mexico and there meets competition from Mexican cement plants as well as from domestic cement plants.

47667 (8) The Victorville plant has in some cases quoted prices on its product f. o. b. plant, and generally speaking has quoted on an f. o. b. destination basis.

(9) The Victorville's most important customer is the dealer, the percentage of barrelage sold to this customer being greatly in excess of the percentage sold to any other type of customer.

(10) The Victorville plant maintains a traffic department which calculates freight rates for rail and for truck delivery, using the official railroad tariffs for the former and trucking rates published by the California State Railway Commission for the latter. This plant has never received or used freight rate books published by The Cement Institute.

(11) In connection with the construction of some large projects in the territory where the Victorville plant markets its products, this plant has submitted bids on cement jointly with one or more southern California plants and has entered into contracts jointly with the same where the bids have been accepted. These projects have involved quantities so large and delivery requirements so great that Victorville could not individually handle the require-

ments or cement specifications which required the manufacture of a new and untried cement and Victorville could not afford to assume entire responsibility for making cement which would meet the requirements of the
47668 specifications. The joint bids in which Victorville participated at all times named special prices which were considerably below commercial prices then being quoted in markets adjacent to the location of the project. Joint bids and joint contracts in which Victorville participated related to cement requirements for the Hoover (Boulder) Dam, which took approximately five and one-half million barrels of cement; the Southern California Metropolitan Aqueduct, which took approximately seven million barrels under shipment schedules involving quantities as high as 350,000 barrels per month; the All American Canal; and, in 1936-'37 the Bartlett Dam. With the exception of the Metropolitan Aqueduct, the contracts involved in these projects were approved and awarded by the United States Government. The first joint bid in which the Victorville plant participated related to cement requirements for the Hoover (Boulder) Dam. This bid was made after consultation with representatives of the Bureau of Reclamation who were advised by the joint bidders that a joint bid was being contemplated. These representatives of the Bureau of Reclamation expressed a desire to receive a joint bid in order that the Government would receive protection afforded by joint liability and would have a constant source of supply, although one or more of the bidding mills might be closed for a reason beyond control of the bidder. These representatives of the
Government also expressed a desire to blend the
47669 cements produced at the several mills of the respective joint bidders in order to obtain the important benefit of a highly uniform product. Acceptance of this joint bid and award of a contract based thereon was submitted to and approved by the Comptroller General of the United States. At the same time the practice of so bidding under similar circumstances was also approved. In all cases of joint bids and joint contracts in which the Victorville mill participated, the purchaser was advised in advance of the intention to submit a joint bid and all contracts and agreements between the joint bidders were submitted with the bids for the approval of the purchaser.

(12) The Victorville plant has never received statistical reports from The Cement Institute covering shipments or production in any of the territory in which this plant markets its cement, but has received statistical information from the Bureau of Mines.

(13) The Victorville plant has never taken any action to combat the sale of foreign cement except to try to persuade prospective purchasers, by force of reason and patriotism, to buy Victorville cement.

(14) Because of the widely differing competitive conditions existing around each of its three several plants, the company has left the matter of sales policy almost entirely in the hands of the sales managers of the respective plants in whom the company has complete confidence.

47670 (15) In the spring of 1933 the Victorville plant became aware that a Code of Fair Competition for the Portland Cement Industry was being formulated by this industry under a National Industrial Recovery Act. Victorville was advised that this work was being carried on through The Cement Institute and that various members of the industry were joining The Cement Institute for the purpose of taking part in the formulation of the Code. In order to protect any interests of the Victorville plant which might be affected by such a code, this plant joined the Institute.

47672 It is hereby stipulated and agreed, that Chester W. Millard, of the Castalia Portland Cement Company (hereinafter referred to as "Castalia" or as the "Company") shall be deemed to have given testimony in this proceeding as follows:

(1) I have been employed by the Castalia Portland Cement Company for the past 16 years, and am familiar with the general operations and financial conditions of the Castalia Portland Cement Company.

47674 (16) Some time ago, the Castalia Company attempted to resign from The Cement Institute. The
47675 resignation was never accepted because the Institute claimed that the company would first have to pay back dues. The first attempt to resign from The Cement Institute was made about 1935. It was also attempted again when the trustee in bankruptcy took possession in 1938.

(17) I have searched the books and records at the Castalia Company, which I am familiar with, to find out when

The Cement Institute was last paid by the Castalia Company. The Company's books show no record of any payment being made to The Cement Institute after December 17, 1930.

(18) Respondents' Exhibit, for identification, 3439-E, F, are letters received from The Cement Institute, and Respondents' Exhibit, for identification, 3439-G is an interoffice memorandum requesting us to pay our back dues.

(19) As long as Castalia produced cement or made shipments of cement, it made reports of same to The Cement Institute and the Bureau of Mines. This was discontinued during 1938 because there was nothing to report.

(20) Castalia produced no cement during this period of January 1, 1932, to date. No shipments have been made by or for Castalia since January 31, 1938.

47677 Mr. Brick: If Your Honor please, there is another matter which I would like to take up at this time. It deals with an offer of evidence concerning f.o.b. mill bids made subsequent to the time of the issuance of the complaint.

Heretofore, when we have offered such proof, Your Honor has excluded it, and in order to expedite the situation, so that we may have our formal tender of proof on the record, I have compiled a series of tabulations covering such bids. I do not think it necessary, if there is no objection to our including this material in the record, of calling individual witnesses from any Respondent companies or from the Government offices which requested the bids. They do constitute a large number of bids. We did not seek to exhaust the entire number of bids, but we do think that we should make reference to a sufficiently

47678 large number to offset any argument which Mr. Wooden might make by reason of the circumstances surrounding the Good Friday bids, and for that purpose we would like to have these bids included in the record. They number 586 separate bids, covering over 300 different projects, and I have no definite suggestion to make as to how they should be included in the record. It would take a long time for me to make an offer of proof covering the situation.

If it is agreeable to Your Honor and Counsel for the Commission, we might have these marked for identification and make proper references in the record to the exhibits so marked, so that, by reference at least, we will have the

benefit of the material in just the same manner as though we made an oral offer of proof while the proper witnesses were on the stand.

Will that be agreeable to Your Honor?

Trial Examiner Norwood: What is the nature of them? Are these f.o.b. mill bids, you say?

Mr. Brick: Yes, sir.

Trial Examiner Norwood: Made around or about the time of the Good Friday bids?

Mr. Brick: Well, yes; I think it is fair to say that, Judge. They are all bids that were made subsequent to the time of the complaint and up to the present time. They
47679 run up to about ten or twelve months ago, so that they would cover both sides of the Good Friday bids, which were made in April, 1938.

I am not attempting to make any argument in support of our position, because Your Honor is well familiar with it—it has been up many times—and these are what we have referred to as flat f.o.b. mill bids. They have no reference to control clauses or to equalization clauses or to destination cost bids. These are merely prices quoted at the mill to the Government in such instances as the Government requested such prices.

Mr. Wooden: I understand that all of them are subsequent to the complaint?

Mr. Brick: Yes, sir.

Mr. Wooden: Well, Your Honor, I can do nothing other than to object, as I have in the past, to evidence relating to transactions since the complaint, unless they meet directly and specifically the particular transactions as to which we put in evidence since the complaint. Otherwise, they are incompetent, irrelevant, and immaterial.

Trial Examiner Norwood: I think Counsel is correct as to that. On one or two occasions since the complaint they have done this.

47680 Trial Examiner Norwood: Offer it for identification and then refer to it in your offer of proof. That will give it a status here.

Mr. Brick: All right. We are willing to abide by any mechanics—

Trial Examiner Norwood: You can sketch it in your offer of proof, and refer for complete particulars to Respondents' exhibit, whatever it is marked.

47682 Trial Examiner Norwood: Let it be marked and then I will hear from you.

(The documents were marked for identification "Respondents' Exhibit 3659-A to 3659-Z-74.")

Mr. Brick: I might add, if Your Honor please, that we made motions to strike the evidence offered by Mr. Wooden relating to the Good Friday invitations and bids which he offered, and Your Honor received, and we also made motions with respect to the testimony of Admiral Peoples, who testified on that subject. Of course, we objected originally when that evidence was offered. Our position has been consistent right along that this case should not concern itself with evidence occurring after the issuance of the complaint, and it is only because of Your Honor's acceptance of Mr. Wooden's offers on that point that we felt it necessary for us to follow that up and to meet it with offers of the character which I have mentioned.

47683 Trial Examiner Norwood: He has not offered it in evidence. It is just part of his offer of proof.

Mr. Brick: Yes. I am assuming, Mr. Wooden, that if we brought the witnesses in and put them on the stand and offered this material in that manner, you would object to it, and that your objection would be sustained on the basis of the prior rulings. That is, that is definitely understood.

Trial Examiner Norwood: Yes; that is right.

Mr. Brick: All we are doing is saving the time of calling witnesses and putting them on the stand, and while they are on the stand offering to prove this material, because that would seem to be needless.

47684 Trial Examiner Norwood: You now offer to prove what is contained in Respondents' Exhibit 3659-A to Z-74, for identification?

Mr. Brick: Yes, sir; and we are willing to do it that way, as far as the mechanics are concerned, if Mr. Wooden and Your Honor have no objection to it, but we want it to stand as an offer of proof of the same character which we would have made if the witnesses were on the stand and at that time we offered to establish through those witnesses the proof relating to the matters contained in these papers.

47686 Mr. Brick: And Your Honor agrees that it would be needless for me to call witnesses?

Trial Examiner Norwood: Yes. They are rejected and I give you your exception.

47687 Mr. Brick: I offer to prove the facts and matters contained in Respondents' Exhibit, for identification, No. 3659-A to Z-74, that being the material which we would be prepared to establish if given an opportunity to do so.

Trial Examiner Norwood: And that is the material that we have been discussing on the record here?

Mr. Brick: Yes, sir; and I consent to a copy of Respondents' Exhibit 3659-A to Z-74 being made a part of the record of this case, through having a copy of this exhibit filed with the Docket clerk in lieu of having it appear verbatim in the transcript of the record.

Trial Examiner Norwood: That is satisfactory.

47688 Mr. Brick: If Your Honor please, I have another group of f.o.b. mill bids which were made by Respondents' Companies prior to the issuance of the complaint. Those are f.o.b. mill bids without any reference to control clauses, equalization clauses, or destination costs. They cover many Respondent Companies and relate to lettings of many different Government departments. They cover 173 different projects, and the aggregate of the bids made in the manner I have described total over 300.

Your Honor will recall that prior to 1935 or 1936 there were very few occasions where the Government re-
47689 quested f.o.b. mill bids, and that there have been different policies covered in the record with respect to the manner in which the various Respondents handled requests for such bids.

For the purpose of expediting the proceedings, we would like to submit these bids as tabulated to Mr. Wooden and request him to concede their authenticity so that we may include them in the record without the necessity of calling Respondents' witnesses and Government witnesses. Your Honor will recall that during the course of the Government's case considerable time was devoted to the matter of bids on the part of various Respondent companies, and that most of those bids related to bids which were made on conditions, and in some instances with respect to control clauses and equalization clauses and destination costs, and matters of that kind, and we feel that it is necessary for the Respondents to have in the record suitable reference to a fairly substantial number of the other character of bids, namely, straight f.o.b. mill bids, and with Your Honor's permission to follow it up in that manner I would like to turn these over to Mr. Wooden, and then, of course, he can

make whatever checks he thinks are necessary just as though we had called the Government witnesses and they had testified from the tabulations as the Government witnesses whom he called.

47690 Trial Examiner Norwood: Counsel may certainly do so, yes.

(Mr. Brick hands papers to Mr. Wooden.)

Mr. Wooden: I understand, Mr. Brick, that you are tendering for checking a list of these bids and not the bids themselves, and you want us to concede the authenticity of the information shown on the list.

Mr. Brick: Yes, sir. The bids, of course—

Mr. Wooden: What period of time is covered?

Mr. Brick: I do not believe, Mr. Wooden, that I have made reference in the tabulations to any bids made prior to the middle of 1929.

Mr. Wooden: And what is the latest?

Mr. Brick: Well, it would be prior to the complaint, so—

Mr. Wooden: But, what is the latest?

Mr. Brick: They go as far as June, 1937. And I might add, of course, that none of the bids to which reference is made in these tabulations are bids which have previously been covered in the record either by Government's Counsel or by Respondents' Counsel.

Mr. Wooden: Well, all I can say, Your Honor, is we cannot concede the authenticity of the alleged f.o.b. mill bids on the basis of a list purporting to show such bids, and we don't have the bids. If we had the bids we might

47691 be willing to concede that those are the bids, probably were, would be, but I do not think we can be expected to concede the ultimate fact which is sought to be established by this list, namely, that they were genuine f.o.b. mill bids.

Mr. Brick: Well, I appreciate that without some further checking Mr. Wooden might not be inclined to concede the authenticity of these bids having been made, but my request goes to a manner of offering this type of evidence without the necessity of taking the time which would be required to offer it in the formal manner of a court proceeding before a jury.

Now, Mr. Wooden's statement would apply to anything these Respondents could bring with them on the stand, because the original bids, of course, are in the hands of the

Government departments and anything that we might bring in here from the offices of Respondent companies would be subject to check by Mr. Wooden against the original source of material which, of course, would be on file in the Government offices.

Now, I'm seeking relief from the burden of the time element that would be involved in proving this matter in the usual courtroom style, and I am hopeful that we can arrange some means of doing it to avoid the issuance of subpoenas to each of these Government departments.

47692 Mr. Wooden: There are no documents being submitted here that I am asked to concede the authenticity of, no copies of bids. If we even had the copies of bids we might concede the authenticity of the bids as such, but this is a list, as I understand it, that purports to give the general ultimate conclusion of facts from those bids, namely, that they were genuine f. o. b. mill bids, but we could not afford to do that, Your Honor, at this stage after fighting this case for nearly four years on that issue. We have seen many incidents where bids which superficially might be called to be—alleged f. o. b. mill bids on proper examination, on cross-examination of the witnesses turned out to be very definitely in the delivered price system.

Trial Examiner Norwood: The Counsel says, though, that he has a list here which can be readily checked from the files that are here in Washington, as I understand it.

Mr. Brick: Well, I think we ought to clear up the nature of the list, Judge.

Trial Examiner Norwood: Yes.

Mr. Brick: Now, this is just what I have. For instance, this tabulation of bids relating to the Bureau of Reclamation of the Department of Interior. Now, as to this specific letting, I have the opening date, the location of the

47693 project, the invitation number, the contract number, and a list of the Respondent companies who bid f. o. b. mill, and, of course, without any reference to any control, equalization, or destination cost conditions and also the amount of the f. o. b. mill bid which was actually submitted, and the name of the Respondent company which got the award. Now, that is what we would prove through the Government's witnesses if we called them to the stand, or through Respondents' witnesses if we called them, but I think we must bear in mind that Mr. Wooden would object to any supporting data or corroborative material

which the Respondents' witnesses, that is, a Respondent officer of a bidding company, might tender, because that also would be subject to check with the original material in the various Government departments. I just wanted to make that statement so Your Honor would understand the nature of the material which we are requesting Mr. Wooden to investigate for the purpose of making concessions so that we obviate the calling of these Government witnesses.

Trial Examiner Norwood: Well, how easy would it be to make that check?

Mr. Wooden: Your Honor, you may recall that on deferred cross-examination that they wanted production of documents that were scattered all over the United
47694 States in the way of bids, and there is no assurance at all that these bids will be in Washington; they may be in San Francisco or everywhere in the United States, and even if they were in Washington I would refuse to assume the burden of checking this list, and then conceding or refusing to concede, as the case might be, whether those bids were geninue f. o. b. mill bids. It is Respondents' duty to prove their case by competent evidence or such facts as are relevant and material, but it is quite a different proposition from my conceding the authenticity of documents made in the ordinary course of business and produced here for my inspection, such as bids or copies of the bids that the Respondent companies retain. We do not have to get the original bids out of Washington before I will concede that those are authentic copies. Let the Respondents produce those if they want to put it up this way, but I cannot concede that this list is a genuine list of genuine f. o. b. mill bids.

Trial Examiner Norwood: Can't Respondents get the office copies of these bids? I think that they should do that.

Mr. Brick: Well, not without, Judge, calling these many witnesses, and, then, too, the practices in various Respondent offices are different. Now, some of them tabulate the
information on charts; that is, the form of the bids
47695 being always substantially the same with regard to a given department. They incorporate that information by dates, and so forth, on ledgers and journals, or books of that kind, and that would not constitute what we would ordinarily concede to be a copy of a bid. They do have the information, and it is on the basis of the actual bid information that we have prepared this data.

Now, as to Mr. Wooden's point, it seems to me that he would be in position to say that with regard to anything which is in our power to bring in here without a subpoena to the Government offices.

Mr. Wooden: Surely.

Mr. Brick: And he just now concedes that, so I do not see that the observance of the formalities will avoid the necessity of calling the many witnesses which would be required if we were doing this in a courtroom, and I think it might be well—

Trial Examiner Norwood: Well, I think Counsel at least might bring in what office copies he can get, and give the Government's Counsel an opportunity to waive identification of them.

Mr. Brick: Well, they are all no different from what I have here, Judge.

Trial Examiner Norwood: But he might see them and see whether they are f. o. b. mill bids, or whether they
47696 are modified bids, or just what they are.

Mr. Wooden: You must have had the bids to make the list up from.

Mr. Brick: No, we have the information, Mr. Wooden, and this is a recapitulation of a great mass of information which has been brought to our attention for the purpose of the case. Now, as to any hardship that might be imposed on Mr. Wooden, I assume that he would check along this line just the same as we did, and when he brought in his many tabulations of bids, and we asked for an opportunity to check, in most cases we were directed to the Government offices for the purpose of checking, and I do not see that his situation at that time is any different from our situation at this time.

Trial Examiner Norwood: Well, I think you might bring in something to check.

Mr. Brick: That is what we want to prove.

Mr. Wooden: Mr. Brick, those were official abstracts made in the regular official course of business, and, as a matter of fact, we went further than the law required in permitting you to check them against the original bids themselves, but this is a wholly different situation.

Mr. Brick: I do not agree with that.

Mr. Wooden: You are bringing in a list you made for the purpose of this case.

47697 Trial Examiner Norwood: Gentlemen, I think you will both concede that I can do nothing about it.

Mr. Brick: Well, no. I think it will be necessary, Judge, for us to make applications to Your Honor in the usual form for subpoenas directed to these various Government departments so that they may bring in their f.o.b. mill bid tabulations together with whatever supporting data by way of invitations and actual bids as might be required by Mr. Wooden.

Trial Examiner Norwood: You make that application to the Commission.

I will ask the Counsel to please lose no time about it.

Go ahead.

Mr. Brick: Under the rules, if Your Honor please, I understand,—the amendment,—such applications may be made to the Trial Examiner of the case.

Trial Examiner Norwood: I believe there is an amendment.

Mr. Wooden: Does that apply to duces tecum subpoenas?

Trial Examiner Norwood: I am not sure. I will have to look that up.

Mr. Brick: And, after all, the practice as to subpoenas has never been very formal, anyway.

Trial Examiner Norwood: Well, I do not think 47698 we can do anything further about that matter.

Go ahead.

Mr. Brick: If Your Honor please, it might be a short-cut method of disposing of this matter if I asked to have these references to the bids which we desire to prove marked for identification, and then I will offer that and ask Mr. Wooden what papers he will require from the Government offices to support or for his checking purposes, and I will make those papers available to him under the subpoena process of the Commission, so—

Mr. Wooden: Of course, Your Honor, it is merely a question of authenticity of documents; it might be a question of whether we are entitled to cross-examine some witness about them. That is a question that is involved in all this.

Trial Examiner Norwood: Well, he is trying to dispose now of the question of identification only; isn't it?

Mr. Brick: Well, I think it will expedite it, Judge, if I make an offer of this material now as a tabulation of the bids and make the offer, and also offer to produce whatever underlying information or data Mr. Wooden desires for

checking purposes, or any other purposes. I do not see how he could possibly have any objection to our putting in the record an f.o.b. mill bid made by any Respond-
47699 ent prior to the complaint. If that bid were filed with the Government—that is, sending out the invitation—it would be sufficient proof for any purpose for us to bring in the Government official who would say, "We received this bid in response to our invitation."

Mr. Wooden: Are you offering this list as an exhibit or are you just making an offer of proof that that includes—

Trial Examiner Norwood: I do not think this offer need be marked, or that it ought to be marked. You may offer it to Counsel on the other side. Nothing can be done about this exhibit by agreement.

Mr. Brick: Oh, no, if Your Honor please—

Mr. Wooden: That is a stipulation which I have already declined.

Mr. Brick: I am offering now the papers which I hold in my hand an exhibits, covering the tabulations of straight f.o.b. mill bids made by Respondent companies prior to the issuance of the complaint, and also in connection with my offer and propose to make available to Mr. Wooden any information which he requires, even though it may be necessary to call the Government officials who requested and received the bids. In other words, I am willing to go the whole distance or such part of it as I am permitted to go.

47700 Mr. Wooden: As I understand the situation, it amounts to an offer of the stipulations between Counsel on the respective sides, and Counsel for the Commission must respectfully decline to accept that offer.

Trial Examiner Norwood: Off the record now.

(Discussion off the record.)

Trial Examiner Norwood: We will have those papers marked now.

(The documents were marked for identification "Respondents' Exhibit 3660-A to 3660-Z-35.")

Mr. Brick: The papers to which I have referred, if Your Honor please, have been marked Respondents' Exhibit 3660-A to Z-35, for identification, and I now will tender those, and Mr. Wooden can advise us of what original bids or original tabulations he desires from the Government officials for the purpose of checking the authenticity of these bids.

Mr. Wooden: May I see the offer?

Mr. Brick: Yes, sir (handing documents to Mr. Wooden).

Trial Examiner Norwood: They are offered in evidence?

Mr. Brick: Yes, sir.

Mr. Wooden: Your Honor, objection is made by Counsel for the Commission to the pending offer of Respon-
dents' Exhibit 3660-A to Z-35, inclusive, on the
47701 ground that they are incompetent, irrelevant, and immaterial, and, particularly that they are incompetent as containing unsworn testimony, or unsworn statements, rather, concerning one of the important issues in the case; namely, whether certain bids were or were not genuine f. o. b. mill bids.

Each one of these documents purports to contain a description of a bid which is alleged to have been made f. o. b. mill. No witness is produced who can be cross-examined as to the real character of the bids themselves. There has been no opportunity for such cross-examination. They are, therefore, incompetent.

I also contend that to consent to a checking of the assertions regarding f. o. b. mill bids made in these papers with the original documents would operate to extend this case an indefinite period of time, and that as to many of the items there is no assurance as to where they are in the United States, and there is no assurance that they could be checked in any reasonable time and under any reasonable circumstances.

We object on all of those grounds.

47704 Trial Examiner Norwood: It is apparent to me that the information contained in Respondents' Exhibit 3660-A to Z-35 is so incomplete that I could not receive it in the presence of objection. Consequently, the objection will be sustained. If, within the time that they have to complete their case, Counsel for the Respondents wish to bring these bids in, I will decide any further questions with respect to them when they are presented and when the witnesses are presented.

Mr. Brick: Well, if Your Honor please, this afternoon I will apply to Your Honor for subpoenas running to officials of these various departments, and which will direct them to attend as witnesses and to bring with them the various data that is required to fulfill the formalities concerning competency.

Mr. Wooden: Your Honor, may I say that this is nothing but a repetition of the tactics that were employed on the deferred cross-examination nearly two years ago, when they subpoenaed and brought in here a number of Government officials, and when they submitted long lists of alleged f. o. b. mills, and it was ascertained at that time that many of them were scattered all over the United States. Whatever proof they could have made on that issue was made at that time, and I submit to you that it was not even credible then. Take, for instance, Mr.
47705 Taylor of the Bureau of Reclamation, whom they called on deferred cross. Mr. Taylor could not tell whether those bids were genuine f. o. b. mill bids or not, that they alleged to be f. o. b. mill bids, and so it went down the line. There was nothing to what they attempted to do on that deferred cross, and which, so far as the merits were concerned, they were permitted to do on the deferred cross; and I tell you again that this thing is nothing but a last minute move to prolong this case indefinitely.

Mr. Leisure: I object, Your Honor.

Trial Examiner Norwood: Well, if Counsel has this evidence to put in here of additional f. o. b. mill bids, they have a right to do it. I am not going to prolong the hearing, however.

Mr. Leisure: No one has asked Your Honor to prolong the hearing.

Trial Examiner Norwood: No; I do not think they desire to do that.

Mr. Leisure: But Mr. Wooden finds himself in a corner, and then when he does find himself there he takes one or two characteristic poses. When he gets hurt, he talks about motives, and the other thing is that he discusses some other case and not this particular one. I am a little weary of having our motives attacked every time we offer a piece of evidence in this case.

47706 Mr. Leisure: The arguments which Mr. Wooden has made, both as to motives and as to the other cases, neither of them is to the point with respect to matters that we are now discussing. The question that we are now discussing is whether or not Mr. Wooden wants to save considerable time and concede testimony which he knows to be the fact, that there were some hundred or more bids here in the Government offices, which we can

produce if he insists upon it. If he does not want to concede that, but attack our motives, he can do so. He may not want to concede it for his own reasons, but we can save considerable time if he would. I do not think it would take much time to offer these bids by Government officials, in this case, if he wants us to do it in that technical manner. That is the only issue that there is here, that and that only. If they are material and relevant when we have done that Your Honor should receive them, and we rely on Your Honor receiving them when we have made that offer.

47711 (RESP. EX. 3488-A to 3488-D, was offered and received in evidence.)

(RESP. EX. 3483-A to 3483-D, was offered and received in evidence.)

(RESP. EX. 3508, was offered and received in evidence.)

47713 J. A. POHLING was thereupon recalled as a witness for the Respondents, and, having been previously sworn, testified further as follows:

47714 *Direct Examination by Mr. Brick.*

The witness identified Resp. Ex. 3661 as a tabulation of the estimated productive capacity of and shipments of Portland cement by plants located in commercial districts as designated by the United States Bureau of Mines, from 1920 through 1937. Cement pamphlets issued by the United States Bureau of Mines were the source of the information contained in that exhibit. He referred to Resp. Exs.
47715 3491, 3492, 3493, 3494, 3495, 3496, 3497, 3498, 3499, 3500, 3501, 3502, 3503, 3504, 3505, 3506, and 3507, but not to the entire contents of any of them but only to certain portions as a source of material for Resp. Ex. 3661. He referred to the particular table which lists productive capacity and another table which lists shipment by districts. Such tables appeared in each of the exhibits to which he has referred. By way of illustration, in Resp. Ex. 3494, the 1923 cement pamphlet of the Bureau of Mines on page 308 is a table entitled "Portland Cement Manufacturing Capacity United States, by Commercial Districts." That is one of the tables to which he referred and from which he obtained his material appearing in

Resp. Ex. 3661. The other information he used was page 297 of Resp. Ex. 3484, which contains a table entitled "Portland Cement Produced, Shipped, and in Stocks in the United States". For his tabulation, Resp. Ex. 3661, he had used the column entitled "Shipments". He used nothing in the columns entitled "Production" or "Stocks". Such a table appears in each of the pamphlets which he used as a basis for Resp. Ex. 3661. He did not use any material other than the two types of tables to which he referred. He can vouch for Resp. Ex. 3661 being an accurate resume of the tables to which he referred as a source of material.

(RESP. EX. 3661-A to 3661-F, was offered and received in evidence.)

The witness identified Resp. Ex. 3662 as a tabulation prepared by him. The tabulation purports to cover expenditure estimates per $1,000,000 of construction contracts awarded. He prepared that tabulation from the publication of the United States Department of Labor, Bureau of Labor Statistics. Resp. Exs. 3663 through 3670 are the documents he referred to as publications of the Bureau of Labor Statistics. In explaining where he took from Resp. Ex. 3663 the information contained on Resp. Ex. 3662 in the various columns, he said that under column "Cement" on Resp. Ex. 3662 alongside the term "Residential Building" he has a figure $40,000, which appears on Resp. Ex. 3663. The total material figure also appears on the said exhibit. Labor is also mentioned on Resp. Ex. 3663 and in the fourth column other expenses and profit are listed. There is nothing on Resp. Ex. 3662 which he took from any other documents than those marked Resp. Exs. 3663 through 3670. The information contained in the footnote on Resp. Ex. 3662 refers to P. W. A. non-residential building. It includes cement and concrete products, which note appears on Resp. Ex. 3664 for the same classification of construction contracts awarded.

The witness identified Resp. Ex. 3671 as having been made by him. The source of the information portrayed on Resp. Ex. 3671 was his tabulation, Resp. Ex. 3662, and the source of material for that was Resp. Exs. 3663 through and including Resp. Ex. 3670. There is nothing on the face of Resp. Ex. 3671 which is not contained on Resp. Ex. 3662. The same explanation applies to the footnote under P. W. A., non-residential building,

appearing on Resp. Ex. 3664 previously stated. In each one of these bar columns the first segment is not only yellow in color but it is striated. That represents the value of the cement consumed for that type of construction. That is in the legend here on the exhibit. He vouches for the accuracy of Resp. Exs. 3662 and 3671.

47729 By Mr. Withrow:

Q. Mr. Pohling, when we were considering a few minutes ago Respondents' Exhibit 3662, I neglected to ask you one or two questions which I wanted to at that time.

47730. Did you examine the publications of the Bureau of Labor Statistics to find out what the various captions that you have covered in 3662 were intended to cover?

A. Yes, sir; I did.

Q. I show you Respondents' Exhibit 3673 and ask you if this is one of the documents you examined (handing documents to the witness)?

A. This Respondents' Exhibit 3673 is one that I examined.

Q. Do you find in there any statement as to what the Bureau of Labor Statistics meant by the items "Labor," "Other expenses," "Profits," and "Materials"?

A. Yes, sir; I did.

Q. For the purpose of completing the tabulation, would you tell us how the Bureau of Labor Statistics uses the term "Material Costs"?

47733 A. The answer is: Expenditures for materials represents the cost of the materials delivered at the site.

By Mr. Withrow:

Q. And how about the term "Labor"?

A. Labor is pay rolls at the site.

Q. And other expenses and profit?

A. Other costs or profits covered items such as taxes, depreciation, rent, profit, insurance, et cetera.

By Mr. MacIntyre:

Q. What "contractor," may I ask, or what do you understand that that refers to?

A. Just what it says here.

Q. Nothing more?

A. Nothing more.

47737 Washington, D. C.,
Thursday, October 31, 1940.

47746 Trial Examiner Norwood: Wait a minute.

The objection is sustained as to Respondents' Exhibits 3662 and 3671.

(RESP. EXS. 3663 to 3670, were offered and received in evidence.)

47751 Trial Examiner Norwood: Mark it.

(The document heretofore marked for identification "Respondents' Exhibit 3673-A and 3673-B," was remarked for identification "Commission's Exhibit 3304-A and 3304-B.")

47752 (COM. EX. 3304-A and 3304-B, was offered and received in evidence.)

47755 It is hereby stipulated and agreed that Richard D. Raff, president of the Diamond Portland Cement Company (hereinafter referred to as "Diamond") shall 47756 be deemed to have given testimony in this proceeding as follows:

1. The Diamond Portland Cement Company was incorporated under the laws of the State of Ohio in 1897 as a successor to a West Virginia corporation of the same name, organized in 1892. There are issued and outstanding at the present time 72,000 shares of common stock of the par value of $1 per share. No bonds or other securities are issued and outstanding.

2. I have been president of Diamond since January, 1937. I succeeded to this position upon the death of my father, Herbert D. Raff, who had held that position since 1928.

3. The other officers of Diamond are: W. W. Kinginger, vice-president; Ray M. Raff, secretary and treasurer. None of said officers now is or ever has been, so far as is known, an officer of any other cement company.

4. The principal office of Diamond is in Middle Branch, Ohio. The company maintains a branch sales office in Cleveland.

5. All standard Portland cement sold by Diamond is manufactured at Middle Branch, Ohio, where its manufacturing plant and deposits of raw materials are located. The mill has a capacity of 1,000,000 barrels per annum. Diamond manufactures standard Portland cement as well

as special cements, all of which are marketed under its own brand.

The first cement was manufactured in 1892. The principal marketing area of Diamond is in Ohio, al-
47757 though about 10 percent of its cement is marketed in western Pennsylvania and northern West Virginia. Almost the only occasion Diamond ships outside this territory occurs when a friendly contractor or owner offers such business to the company, and Diamond wishes to retain his good will for business in its normal area.

6. The sales policy of Diamond is to sell only to dealers, the United States Government, State Governments, counties, railroads, water supply, water power, flood control, and irrigation projects; contractors on the above classes of work, concrete and cement products manufacturers, and concrete mixing plants. Diamond does not sell its products at retail. The qualifications which Diamond requires its dealers to possess vary according to the locality of the dealer. They may or may not be required to carry a general line of building material as well as cement.

The major part of the Diamond output is marketed through dealers. Diamond covers its sales area at the present time by eight salesmen who are located at points scattered throughout the sales area. These salesmen do not carry or have Cement Institute freight rate books.

7. Diamond cement is sold in competitive chiefly with the following: Bessemer, Medusa, Standard Pittsburgh Plate Glass, Universal Atlas, Huron, Lehigh, Southwestern, Wabash, Alpha, West Penn, and Superior. At some points the competition of these additional companies
47758 is encountered: Green Bag of Pennsylvania, Green Bag of West Virginia, Aetna, Consolidated, Federal, Kosmos, Lone Star, Louisville, Peerless, Standard Lime and Stone, and Wolverine.

8. Diamond, to the best of my personal knowledge and recollection, has never at any time agreed with any competitor, either expressly or impliedly, directly or indirectly, to use or employ any particular system or method of pricing or marketing.

9. Diamond, to the best of my personal knowledge and recollection, has never at any time agreed with any competitor, either expressly or impliedly, directly or indirectly, to quote the same price as such competitor for cement, at any place, or to any customer, or to make the same bid

for any public contract; and in all instances where the price or bid of Diamond has been the same as the price or bid of any of its competitors, such identical prices or bids have been due solely to the fact that Diamond has found and met the prevailing or market price, and they have not been caused by any express or implied agreement or understanding between Diamond and any of its competitors.

10. Diamond, to the best of my personal knowledge and recollection, has never exchanged price information with competitors in advance of a bid or price change. Our price lists have never been supplied to others than our own salesmen.

47759 11. The Cement Institute, to the best of my personal knowledge and recollection, has had nothing to do with regulating, fixing, or affecting the price of cement. The Institute has never attempted to direct or to exert any influence over Diamond's prices or policies.

12. Pursuant to requests of Counsel for the Commission concerning my knowledge of certain Commission exhibits, I state the following:

(a) At the request of our attorneys, the files of the company have been searched for the purpose of locating a letter from Mr. Horner of Kosmos addressed to me, to which Commission's Exhibit 817-K might be a reply. No such letter has been located. Commission's Exhibit 817-K is a letter which I wrote to Mr. Horner of the Kosmos Company.

(b) Commission's Exhibits 1923 and 1930, inclusive, were documents prepared by me and distributed to employees in the sales department of the company.

(c) Commission's Exhibit 971-10-P, 10-Q is a document which I do not think I had ever seen before it became an exhibit in this proceeding.

(d) Although Commission's Exhibit 2658 appears to have been written by me, I have no recollection of it.

(e) I have no personal knowledge or any recollection concerning Commission's Exhibit 2659.

(f) I have no personal knowledge or any recol-
47760 lection concerning Commission's Exhibit 2660.

(g) I have no personal knowledge or any recollection concerning Commission's Exhibit 2661 and do not recall ever having discussed this document with anyone.

(h) Commission's Exhibit 2662 was prepared by me at the request of my father while he was president of Dia-

mond as a basis for discussion by the board of directors of the Diamond Company. To my personal knowledge and recollection the document was never put to any other use.

(i) I have no personal knowledge or any recollection concerning Commission's Exhibit 145. At the time this letter was written, I had nothing to do with the management or policies of the company.

47763 Respondent Beaver Portland Cement Company (hereinafter referred to as "Beaver Portland"). hereby offers to prove by D. L. Carpenter, former president and director of sales, by B. Statter, present president and director of sales, and B. C. Nelson, secretary, of said respondent, as witnesses for said respondent, and by various documents, each and all of the following facts, to wit:

47764 1. Beaver Portland was incorporated under the laws of the State of Oregon on April 14, 1913.

2. None of the officers or directors of Beaver Portland are officers or directors of any other cement company.

3. The company's mill is located at Gold Hill, Ore.

4. The capacity of the mill is approximately 450,000 barrels per annum, but its actual production has ranged from a low of 75,000 barrels to a high of 350,000 barrels per annum.

5. The company's normal sales area is located in western, central, and southern Oregon, some of the northern counties of California and some small quantities of cement are shipped into southern Washington.

6. The principal competitors of Beaver Portland are:

Name of Company.	*Location of Plant*
Oregon Portland Cement Company,	Oswego, Ore.
Santa Cruz Portland Cement Company,	Davenport, Calif.
Pacific Portland Cement Company,	Redwood City, Calif.
Calaveras Cement Company,	Kentucky House, Calif.
Henry Cowell Lime & Cement Company,	Cowell, Calif.
Monolith Cement Company,	Monolith, Calif.
Permanente Corporation,	Permanente, Calif.

Competition with companies other than those named is negligible.

7. The general policy of Beaver Portland is to sell only to dealers; the United States Government and State
47765 Governments, railroads and railroad contractors, contractors doing paving or bridge work for the United States and State Governments, owners or contractors purchasing for major water development, power development, flood control projects and irrigation districts, manufacturers of cement and concrete products, and commercial concrete mixing plants; Beaver Portland does not seek retail business. Dealers selected must in general carry a line of other building material as well as cement. Beaver Portland covers its sales area at the present time by three salesmen, two of whom are headquartered at Portland, Ore., and one at Medford, Ore.

8. Beaver's mill has a relatively small productive capacity.

9. Such prices have not been set by reason of any agreement, express or implied, but have been entirely due to inability to establish, maintain, or secure a higher price than those currently quoted by competitors, coupled with unwillingness to accept any lower figure in any given instance; hence, whenever Beaver Portland has been able to learn competitive prices from price lists or from reports of its salesmen, its quoted prices have been identical with those of its competitors. The only exceptions to the foregoing pricing procedure were Beaver Portland's joint bid to the Treasury Department, Procurement Division, Bu-
47766 reau of Supplies, with five other companies, dated April 4, 1939, to furnish cement for the Shasta Dam Central Valley Project in California, and a joint bid made by Beaver Portland with the Oregon Portland Cement Company to furnish cement for the Bonneville Dam, in Oregon.

47771 E. R. OLIVER, called as a witness for the Respondents, being first duly sworn, testified as follows:

Direct Examination by Mr. Werle.

47772 I am E. R. Oliver. I am vice president in charge of traffic of the Southern Railway System with office in Washington, D. C., and have held that office approximately 16 years.

47772 Q. Are there portions of the lines of the Southern Railway System where the United States Government has been entitled to shipment by land-grant rates?

A. Yes.

Q. Will you just explain for us briefly what these Government land-grant rates are.

47773 A. Well, the land-grant rates, Your Honor, apply over those railroads which in the beginning were aided by the Federal Government through the grant of land over which the Federal Government has retained the right to transport its traffic, the rate for such transportation being fixed by statute.

Now, we have on the Southern Railway System two such instances, on our Alabama-Great Southern Railroad between the Alabama-Tennessee line, and the Alabama-Mississippi line, and on the Mobile Division between Jacksonville, Ala., and Selma, Ala. Of course, there are other land-grant roads in Southern territory on which the Government is entitled as a matter of law to land-grant discounts.

Trial Examiner Norwood: That is a discount, then, is it?

The Witness: It is a discount, yes, from the commercial rate, if that is what you mean.

47774 By Mr. Werle:

Q. Have you finished, Mr. Oliver?

A. I think so, unless you want your answer further amplified.

Q. Well, perhaps I can amplify it in this way: Will you tell us what information or what data you require in order to determine what the land-grant rate is to which the Government is entitled?

A. Well, by statute, the Government is entitled to a discount of 50 percent of the commercial rate, or the commercial earnings between points on these land-grant roads. Now, you arrive at that discount by taking either the local commercial rate between these points or that portion of the through rate, a through rate, that would be allocated to that segment of the line, and whatever that amount is the Government is entitled under the law to a deduction in either the commercial rate or in the through rate to the extent of that discount.

Q. And does the Southern Railroad have the information—that is to say, so they can tell what this deduction or discount is?

A. Yes, we have that information in two ways: We have it from our records, from our own tariffs, and our own percentage and division sheets. We have it compiled over a period of years from our experience in the handling of this traffic, and then we also have it from an-
47775 other source, namely, a publication by the War Department. Now, this publication by the War Department is undoubtedly a compilation of experiences under the operation of the land-grant laws.

Q. Is there any secret about these land-grant deductions between the Southern Railway and the United States Government, or have they made that information available?

A. Oh, no, there is no secret at all about it. It is available not only from our own records, but it is available from a public document published by the War Department to which I can give you reference if you would like to have it.

Q. And you are referring, are you, Mr. Oliver, to a circular entitled "Land Grant Percentages," published by the office of the Quartermaster General of the War Department; is that correct?

A. That is correct.

Mr. Werle: If Your Honor please, I believe there is one of these in evidence, and for that reason I do not see that there is any point in duplicating the record on it.

By Mr. Werle:

Q. Now, Mr. Oliver, can you tell us of your own knowledge whether or not the Southern Railway receives requests from shippers of various commodities and industrial goods for land-grant rates applying between given points?

A. Oh, yes, we receive such requests.

47776 Q. And have you received such requests from shippers of cement?

A. Yes, I think perhaps we have received more requests from shippers of cement than any other one commodity.

Q. And have any such requests come to your attention personally?

A. Oh, yes.

Q. Has the Southern Railway had any practice as to whether or not it would furnish land-grant information on request to shippers?

A. Well, we furnish such information to shippers to the

best of our ability. We always like to accommodate the patrons of our railroad, and we haven't hesitated to give shippers the benefit of our knowledge respecting these land-grant rates, these land-grant deductions or discounts, whichever you may want to call them.

Q. And for how long a period has the Southern Railway done that?

A. Well, I can testify to a period of 16 years since I have been in charge of the Southern Railway's traffic department.

Q. Does it make and difference in your ability to furnish this information if either the shipping point or the ultimate destination, or both, are not points on the lines of the Southern Railway?

A. No, it does not.

47777 Q. And has the Southern Railway furnished information in such cases as that from time to time?

A. Yes. I recall not so very long ago we furnished one of our shippers with information respecting land grants on reinforcing steel bars to the Boulder Dam, for example, away out in the West. That information was necessary to enable him to bid on that contract.

47778 Q. Now, Mr. Oliver, when more than one shipper or where several shippers of cement request land-grant information from the Southern Railway between two points, do you give each of them the same information or do you give each of them different information?

A. Oh, we give them the same information, of course.

Q. Taken from the records which your railroad keeps; is that correct?

A. That is correct.

Q. Now, there is some evidence indicating that when you furnish land-grant information to cement shippers, Mr. Oliver, that you do not guarantee the rates. Will you explain that for us, what that means, and why that is so?

A. Well, we cannot guarantee rates that we do not publish and file with the Interstate Commerce Commission. We do not publish these land-grant rates and, obviously, we cannot guarantee them. They are correct to the best of our knowledge and belief, and they are quoted to the shippers with that understanding, and the shippers know that condition is attached to these quotations. The quotations are made based on our experience over a period of

years, and they are reasonable accurate, but after all the Comptroller General of the United States settles the freight charges on Government traffic, and sometimes we have arguments with that gentleman about what the
47779 freight charges are or should be, so that—

Q. Well, as to that, may I just interrupt you there: Is the decision of the Comptroller General of the United States as to the land-grant rate which the Government will pay, is that binding on the Southern Railway, or do you have recourse in some other form?

A. Well, when we differ with the Comptroller General we have the right to appeal to the United States Court of Claims.

Q. And have you done that from time to time?

A. Oh, yes. We have exercised that right because sometimes we do not agree with the Comptroller General and sometimes there is a rather vital question of principle involved, and we think we have to litigate that principle. We have not hesitated to go to the Court of Claims when we thought we were right.

47781 Q. Well, Mr. Oliver, will you tell us in these situations you say from time to time that the Comptroller General wants to settle on some rate which is different from the one which you arrive at. Let me ask you as to that: Are the rates that you furnish, are they estimates in the sense that you do not know whether they are correct or not correct?

A. No, I would not say that at all. On the contrary, the rates that we furnish are to the best of our knowledge and belief the correct land-grant rates. They are based on the knowledge that we have of our tariffs and our division and percentage sheets which are established after the most mature consideration.

Q. And based on the documents and data which you have already described?

A. That is correct. This document is undoubtedly based on experience covering settlements of prior shipments and all that sort of thing, but even so there are many instances in which we disagree with the figures contained in this document, because sometimes the Government will insist upon the application of a land-grant rate via an unnatural and circuitous route that we do not recognize for

commercial traffic, and, consequently, we do not think should be used in figuring a land-grant rate.

Q. So far as you know, with respect to this date
47782 which you got, do you have the same documents, the same data available, that the Comptroller General has; isn't that correct?

A. Yes.

47785 Q. Well, Mr. Oliver, will you just, following that line of inquiry, will you tell us what the facts are as to the relationship between the Government and the railroads in connection with these land grants?

A. Well, in the beginning the railroads were aided in their construction effort by these land grants. The country had to be developed, and this was one way of undertaking that development.

Q. By that you mean that the Government gave some grant or right over a portion of land to the railroads; is that correct?

A. To encourage the construction of the railroad.

Trial Examiner Norwood: Did the railroad get title to the land?

The Witness: No, the railroads were not entitled to the land, Your Honor.

Trial Examiner Norwood: Given the title,—they conveyed the land to the railroad?

47786 The Witness: Oh, yes, the title was conveyed to the railroad, and the railroad, in turn, used that aid in its construction. Then the next step was the development of the territory. The railroads undertook to bring in settlers and sell this land off to them; in many instances at very nominal prices per acre. The whole theory being to get the territory settled up so it would support the railroad.

By Mr. Werle:

Q. In return for the grant of land the railroad agreed with the Government to give it certain privileges in connection with hauls over that land; is that it?

A. I don't think the railroad agreed, Mr. Werle. I think is was fixed on the railroad by statute, and I think it came after the railroads were built.

Q. I see.

A. After the railroads were aided and after they were

constructed, then the Congress, by statute, said that these land-grant roads were to be used as highways for military impedimenta, troops, and so forth, and the original law would have required, and I believe did require, the railroads to transport such impedimenta free. Then the Government, or then the Congress recognized that that was not fair, and they allowed the railroads a certain percentage of the rate, the division of the rate, for performing this service, this percentage usually representing
47787 according to my calculations, about the cost of handling the traffic. In other words, the Government retained the right to use these land-granted railroads as a military highway, so to speak, and then they paid the railroads certain amounts for performing the service of handling troops, impedimenta, and Government supplies. Now, of course, the activities of the Government increased as time went on, and the Government began to handle traffic which was never in original contemplation.

47788 *Cross-Examination by Mr. Wooden.*

Q. As to these statutes which fixed the conditions regarding land-grant rates over your road, they also made the grant of the land itself; did they not?

A. No; I don't think so. The statutes came later. The land was—

Q. You mean the land was granted first.

A. Oh, the land was granted away back yonder, and the statutes came later. I am speaking now generally. I do not recall the date that these lands were granted to these two parts of our system, but I am quite clear that the statute fixing the land-grant discounts came after the land grants were themselves authorized.

47789 Q. Were not the conditions in reference to land-grant aided roads requiring some of them to haul Government-owned property or Government troops and impedimenta, as you call it, a part of the statute which made the land grant itself?

A. It was certainly in the statute, but I don't
47790 think the land grant itself, the individual land grant, was in the same statute. That was something different.

Q. Are you speaking now of the Southern Railway when you say that?

A. Yes.

Q. Or are you speaking more broadly?

A. I am speaking particularly with respect to the Southern Railway System. Now, my recollection is that these land grants were authorized, and then the Government discounts on Government traffic were covered by a separate statute enacted by Congress.

Q. But the making of those special rates was provided for in the original grant, was it not?

A. In the original statute?

Q. That is what I mean—making the grant?

A. Well, I won't be sure about that.

Q. You do not know as to that, then; is that it?

A. No; I don't know that the statute required us to make these deductions at the time the land was granted to us. Of course, the statute is a general statute; it applies all over the country.

Q. Now, I understood that you have had many instances where your information as to the land-grant rates between particular points was not in agreement with the settlement rates that were actually applied.

47791 Mr. Werle: I object to that, on the ground that the witness did not so testify.

Trial Examiner Norwood: Objection overruled.

A. Well, we have had a good many instances where we did not agree with the Comptroller General.

By Mr. Wooden:

Q. And the Comptroller General's opinion was what settled the final rate on which payment should be made?

A. That governed them, subject to our right to appeal to the United States Court of Claims.

Q. Have you appealed such cases to the Court of Claims?

A. Yes; we have.

47792 Q. Well, you do know, do you not, Mr. Oliver, that frequently the rate on which payment was finally made involving land-grant rates was different from the rate that you had computed in advance?

A. Yes.

Q. How frequent has that been?

47793 A. Well, it is hard to answer that question accurately. I could not tell you without an examina-

tion of our records. As I stated a moment ago we have a claim pending now, which involves quite a principle that we felt we had to litigate, and only in the last few days I recommended to our management that we file another such claim with the Court of Claims, because it involved a question of principle on which we could not accept the Comptroller General's ruling without a contest, without a legal adjudication of it.

Q. Was that on land-grant rates?

A. Yes.

Q. Now, you have found, have you not, that sometimes the settlement rate with your railroad is above the amount that you had computed in advance, and sometimes below?

A. Well, I don't know about that, sir, because I do not handle that detail. I dare say that there are instances where we send a bill to the Government and the Comptroller General pays us more than we have asked, just as there are instances where he pays us less than we have asked.

Q. When you say "less" and "more" than you have asked, you mean less and more than you computed to be the rate?

A. That is correct.

Q. Do you not?

A. That is correct.

47794 Q. Now, is there not a fact that there is considerable room for honest and expert differences of opinion as to what is the correct land-grant rates applicable between two points?

Mr. Werle: I object to that question, since I was not permitted to go into that. That is pretty much the same question that I asked him, although in a slightly different form.

Mr. Wooden: No; it is not.

Mr. Werle: I asked him whether or not he considered that the land-grant rates determined by the Comptroller General were more or less correct than the land-grant rates determined by the Southern Railway?

Mr. Wooden: That is a wholly different question.

Trial Examiner Norwood: Read this question.

Mr. Werle: And the objection to that question was sustained.

(Question read.)

Trial Examiner Norwood: Objection overruled.

Answer the question.

A. Well, of course, there is room for a difference of opinion. We think that our opinion about these things is better than the Comptroller General's opinion, and sometimes he differs with us. Now, if I may be permitted to do so, I will give you an illustration of what I have in mind.

By Mr. Wooden:

Q. Well, I have not any real objections, except
47795 that I do not think that it is necessary at this moment. You can go into it later, if Your Counsel wishes you to.

Trial Examiner Norwood: Go ahead.

By Mr. Wooden:

Q. When you say there is room for difference of opinion, you mean that there is room for difference of opinion even among experts on the subject of rates?

A. That is true.

Q. As a matter of fact, that is true on commercial rates, as well as on land-grant rates; is it not?

A. Well, we frequently have differences there. Of course, our experts, working on those rates all the time, are a little better able to judge the correct rate than some other rate; but, again, I suppose that is a matter of opinion.

Q. Your ability to compute an accurate land-grant rate is greatly increased in difficulty, is it not, when you get off onto other roads than your own?

A. Oh, yes.

Q. What is the reason for that?

A. Well, it is obviously due to a less close contact with that particular situation. We have to be more careful with another man's tariffs and division sheets than we are with our own, because we do not have as much to do with them; we have not had as much experience with them as we have had with our own.

47796 Q. Don't you have quite a little difficulty with regard to division sheets, the division of rates between different roads?

A. Oh, yes. Sometimes we have to ask the Interstate Commerce Commission to fix them for us.

Q. And the roads do not interchange very freely their division sheets; do they?

A. Well, we are supposed to.

Q. Well, as a matter of practice.

A. I don't know of any instance where we have withheld our division sheets.

Q. Do other roads withhold theirs?

A. There may be instances where other roads have not given us theirs, and I would not be absolutely sure that we have not declined to give other roads some of ours, but the general practice among railroads is to explain their division and percentage sheets, because they are the basis on which the interline settlements are made between our respective accounting departments.

Q. But the railroads do not provide other shippers with their division sheets; do they?

A. Oh, no.

Q. As a matter of fact—

A. There is one exception to that?

Q. What is that?

A. We do file our division sheets on coal with
47797 the Interstate Commerce Commission.

Q. With that exception the railroads keep their division sheets quite secret from their shippers, do they not?

A. We do not give them to the shippers.

Q. Is not that the general railroad practice?

A. Yes.

Q. You referred to a publication of the War Department on land-grant rates. Do you know what the date of that was?

A. The one I have before me is dated June 30, 1937. That is a re-issue of circulars in effect prior to that date.

Q. Well, that did not reflect all land-grant rates on all railroads, did, it, and between all points?

A. No.

47798 Q. You do not mean to say, do you, Mr. Oliver, that the Government or any department of the Government has published all of the land-grant rates on all of the railroads throughout the country between all the shipping points and all the destinations?

A. No; I do not, for this reason: We file so-called equalizing agreements with the Government, which means that non-land-grant roads equalize the freight charges that are made by the land-grant roads. In other words, all the Government traffic does not move over land-grant roads, but the Government gets the benefit of the discount, nonetheless, because the competing land-grant roads equalize the land-grant discount.

Q. But you know of no publication by the Government, or any Government department, do you, that contains the land-grant rates from all the railroads or between all the shipping points and all the destination points?

A. No; I know of no such publication. This publication here deals only with the railroads on which there are specific land-grant deductions. Now, whether this includes all of them throughout the United States I would not know. My impression is that it does not. It does include the ones in which we are particularly interested.

47799. Trial Examiner Norwood: As to those railroads which equalize their rates, that is only done as between competing points; is it not?

The Witness: That is correct.

Trial Examiner Norwood: And in no other case?

The Witness: That is correct. In no other case would it come into play.

By Mr. Wooden:

Q. And it is done only with the Government?

A. That is right.

Q. And not with any other shippers?

A. Absolutely not. It is only done with the Government and on the traffic to which the Government is entitled to land-grant discounts.

Q. There has been no publicity given to the fact that you make those equalizing agreements with the Government?

A. Oh, yes, everybody knows about that. The shippers all know about those agreements.

Q. The fact that they are made, but, I mean, the terms of the agreements are not known generally; are they?

Mr. Werle: I object to that. I think we are going beyond the direct examination.

By Mr. Wooden:

Q. They are not published?

A. They are not published—

Trial Examiner Norwood: Objection overruled.

47800 Mr. Werle: They cannot go into equalizing agreements between the railroads and the Government.

Trial Examiner Norwood: Go ahead.

A. But I would like to make it clear that the shipping public knows that the railroads have among themselves equalizations. It is perfectly—if I may go into this for just

a moment—it is perfectly clear why they are necessary. If we did not have them on file with the Government it would mean that all the traffic in which the Government is interested, and on which it is entitled to land-grant discounts, would move over land-grant roads. Now, there are other competing roads over which these land-grant discounts do not legally apply, so that the railroads have voluntarily met this competitive situation, and it gives the Government a choice of a wide variety of routes.

By Mr. Wooden:

Q. But there are many points to which shipments are made and to which an equalizing agreement would have no application?

A. That is correct.

Redirect Examination by Mr. Werle.

Q. Mr. Oliver, when the Government and the rail-
47801 road—your railroad—settle, they pay your bill on the land-grant shipment; they pay you so much. Do you keep any record of the amount that was settled upon between the Government and your railroad? Do you keep any record of that in your file?

A. Oh, yes. That record is kept as a permanent record in our accounting department.

Q. And can you tell me whether or not you use that information in preference to some other figures when furnishing a rate to a cement manufacturer or a shipper, if he requests it?

A. Well, when there is no dispute as to that settlement, and we think the settlement is correct, we use it as an official record, so to speak, for the future.

Q. Do you have occasion to use that so-called official record on many occasions, or only on few?

A. It is the record to which we refer, yes. When a man asks us what would be the net Government rate or net land-grant rate on a certain commodity from and to a certain point, that is the place we go to get it, because it obviously saves recalculation, and all that sort of thing.

Recross Examination by Mr. Wooden.

Q. Mr. Oliver, after you have made your permanent record of that settlement rate as between two points on a land-grant shipment, you find that sometimes there is
47802 further dispute and a further change in the settlement rate between those points on later shipments?

A. Well, you remember, I qualified my statement by saying that if we accepted that settlement as being correct. Now, if there is a dispute about that settlement, of course, that is quite another matter entirely.

Q. Well, even though you accepted it as correct, may there not be a change in that particular rate on a later shipment?

A. There might be; yes, sir.

Mr. Wooden: That is all.

By Mr. Werle:

Q. Do you know of any such instance, Mr. Oliver?

A. I do not recall any at the moment, sir.

47837 Mr. Withrow: Mr. MacIntyre, have you a report you wish to make?

Mr. MacIntyre: There is an offer pending, made by Mr. Withrow, of Respondents' Exhibits 2458-A and B, and 3062. They purport to be a tabulation of dues paid to The Cement Institute by the Superior Cement Corporation, attached to two letters purporting to be signed by Mr. E. H. Davis, president of that corporation, transmitting them to the Federal Trade Commission.

Now, I recall that when Mr. Davis was on the stand, on redirect examination Mr. Withrow asked him, at page 29677, line 16, if he would please supply such information as is purported to be transmitted by these tabulations. It was furnished apparently in response to that request, and now offered in evidence.

47838 (RESP. EXS. 2458-A, 2458-B, and 3062 were offered and received in evidence.)

47859 Washington, D. C.,
Friday, November 1, 1940.

47880 HENRY H. TITSWORTH, called as a witness for the Respondents, being first duly sworn, testified as follows:

Direct Examination by Mr. Werle.

I am associated with the Glens Falls Portland
47881 Cement Company. I am Chairman of the executive committee, and president. I determine the policies and practices of the company. I have been chairman of the executive committee since about the middle of 1937, possibly a little earlier. I do not remember the exact date. I have been president since the "beginning of 1938, of 1939."

I first came with Glens Falls in December of 1936. I have been in industrial engineering a great many years, formerly a manufacturer in the Middle West, financial industrial engineering principally. At the time that I went with Glens Falls Mr. George Bayle, Jr., was pres-
47882 ident. No one who was connected with Glens Falls in an executive position or in charge of the management of the company at the time I went there still holds any executive position with the company at the present time, with the possible exception of the assistant treasurer, who has some executive authority. I have employed them all. There is no one connected with Glens Falls at the present time, in an executive position, who is familiar with the commercial operations of the company prior to the time that I went with the company. No officer or director of Glens Falls is an officer or director of any other cement manufacturing company. Glens Falls is not connected or affiliated in any way with any other cement manufacturing company. Apart from the one plant at Glens Falls, New York, Glens Falls has no warehouse, silo or other
47883 distributing points. There are materials used in the manufacture of Glens Falls cement which is not available at Glens Falls. We purchase sand and iron for certain specifications representing a small part of our product. I found the company capacity rated at 1,350,000 barrels a year. I consider that rating fair for capacity.

"The ordinary bottle-neck or the kilns." Our kilns
47884 have a capacity of 5,300 barrels per day, 4,500 barrels per day. In 300 days would equal 1,350,000 barrels, so I consider the figure conservative.

By Mr. Werle:

Q. Mr. Titsworth, will you describe for us, please, briefly, the area in which the Glens Falls Company normally solicits business and ships its cement?

A. New England, New York State as far west as
47885 Rochester, including—that includes the metropolitan area of New York, and New York State, all shipments into northeastern Pennsylvania and occasional shipments in eastern New Jersey.

Q. Do you ship any substantial amounts of cement into the State of Maine?

A. Very little.

Q. And into, I think you said, northeastern Pennsylvania or eastern New Jersey?

A. A very small amount at both of those points.

47886 Q. Mr. Titsworth, is it any part of your business as chief executive of the company to give consideration to the markets and the area in which your company will sell its product?

A. It is.

Q. And have you given consideration to that question during the period that you have been with the company, since December, 1936?

A. I have.

Q. And in that connection, have you given any
47887 consideration to prior markets in which your company has sold its cement, from the records of the company which were available to you?

Mr. MacIntyre: I object.

Trial Examiner Norwood: You cannot show it that way.

Trial Examiner Norwood: Objection sustained.

Mr. Werle: Then, in that connection, I am going to make a brief offer of proof, Your Honor.

Trial Examiner Norwood: Yes.

Mr. Werle: I offer to prove through this witness, if permitted to do so, that the witness, when he came with the company, found that the active solicitation of business by the Glens Falls Company for about 10 years prior to the time that he came there had been largely limited to

the area shown by the line running north and south through Rochester, N. Y.; that at the time prior to that the company had solicited business further west than that, and that he also found that the company had been compelled to abandon those markets in that western section through competition of new mills, lower prices and better service which came about.

47888 By Mr. Werle:

Q. Now, Mr. Titsworth, will you tell us whether during the period that you have been with the company the area in which you are selling has been further restricted in any way?

A. It has.

Trial Examiner Norwood: You are speaking of the time prior to July 2, 1937?

The Witness: Yes.

Trial Examiner Norwood: And the time that you came with the company is part of that time in which it was restricted; is that correct?

The Witness: Yes, sir.

By Mr. Werle:

47889 Q. And can you tell me what were the causes for that, just briefly?

A. Primarily, the building of silos at Oswego, N. Y.

Q. And the effects of that on your company was what, please?

A. The elimination of a considerable number of old dealer accounts.

Q. Now, will you tell me, Mr. Titsworth, what considerations determine the area in which you do solicit business and ship your cement? What I am really trying to find out is how you determine the points to which you reach out?

A. Well, there are three or four factors that enter into that. One is our service as compared with the service of competitors; another is the freight rate; another is the volume of business available, and another is sales cost.

Q. Do you or do you not consider those matters in individual situations which might arise from time to time?

A. I do.

Q. Can you tell us the approximate number of other cement companies with which the Glens Falls Company

comes into competition in these various markets where it sells?

47890 A. The Lawrence Cement Company in Maine—

Q. I do not think you need to name the companies.

Trial Examiner Norwood: No; just give us the number and not the names.

By Mr. Werle:

Q. Tell us the approximate number.

A. Oh, just the approximate number?

Q. Yes.

A. Twenty-five.

Q. Now, have you had any understanding or arrangement or agreement with any other cement company as to the area or the territory in which you will solicit business or ship cement?

A. I have not.

Q. And have you or the company during the period of time that you have been there had any understanding or agreement or arrangement with any other cement company whereby the business that is available is to be allocated between your company and others in any way?

A. I have not.

Q. Now, I want to come to the question of your prices, Mr. Titsworth. Will you tell us how your company determines the prices which it quotes?

47891 A. Through salesmen and old customer accounts, we try to learn the lowest destination price which we have to meet.

Q. And having learned it, what do you do?

A. We meet it, or not, as we see fit.

Q. The record indicates, Mr. Titsworth, that the mill of the Glens Falls Company has been commonly referred to as a non-base mill. Is that still true of your mill at Glens Falls?

A. Yes.

Q. And has that been so during the period that you have been with the company?

A. Yes.

Q. During the period that you have been there, have you given any consideration to, perhaps, changing that mill by issuing price quotations of your own in such a way as to initiate new prices; that is, to make it a base mill, so-called?

A. I naturally studied the question when I first went there.

Q. And did you come to any determination about it?

A. I came to the conclusion that the only way we could sell cement was to quote as low or lower prices in the entire territory where we sold, eliminating any particular problem in my mind of changing from non-base to a base mill.

Q. Now, can you tell us, Mr. Titsworth, in what general area the Glens Falls Company has what is termed a freight advantage over other competitor companies?

47892 A. It is a small area geographically and an area with a small population. It runs north of the mill, which is located 50 miles north of Albany; it runs north of the mill to northern New York, not northwest, just north; it runs on one line of railroad as far as Rutland, Vt., which is approximately 45 miles. That is east. It runs south towards Albany, but not to Albany. Our rates are higher than a very considerable group of mills to the first point where we strike any large cement demand.

Q. As to this area running north, what is the character of the area; is it populated thickly, or otherwise?

47893 A. That territory north of the mill is very thinly populated. There are very few towns of any size. It contains the Adirondacks.

Q. Now, Mr. Titsworth, will you tell us whether or not this factor of your freight advantage in the areas in which you have that freight advantage has been considered by you at all in connection with whether or not you might change your mill to a so-called base mill?

A. Why, very naturally.

Q. Will you just explain that briefly for us?

A. The small size of the territory and the small volume of cement that it consumes makes that territory relatively immaterial to us from any angle.

Q. Now, will you tell me whether or not you or the management of your company, since you have been there, to your knowledge, of course, has had any arrangement or any understanding of any kind or character with any other cement companies as to whether you would or would not change that mill from a so-called non-base to a base mill?

A. I have never discussed the matter with any competitors.

Q. You learned of prices from your salesmen and
47894 customers. Does the company have any source of information with respect to the prices charged by competitors other than that information that it gets in the manner you have described?

A. No.

The witness identified Resp. Ex. 3716-A and B as a Glens Falls quotation form used during the period he was with the company prior to July of 1937.

47895 (RESP. EX. 3716-A and 3716-B, was offered and received in evidence.)

By Mr. Werle:

Q. Am I correct, Mr. Titsworth, that you do publish your prices on quotation forms of that character; is that the way you publish your prices to your trade?

A. Yes.

Q. Now, having published your prices in that fashion, will you tell me whether or not during the period that you have been with the company and within your knowledge that the company makes deviations from its published prices?

A. It has.

47899 Q. Did the Glens Falls Company, Mr. Titsworth, change its policies or practices in any way as of July, 1937?

A. Not as of that specific date, no.

Q. Will you tell us to the best of your knowledge whether or not your company has made deviations from its published prices prior to July, 1937?

A. Such deviations were made after I came to the company and prior to July, 1937.

Q. And why do you do that?

A. I was not personally responsible for those deviations.

Q. Now, will you please explain that answer.

A. They came prior to the time that I was made chairman of the executive committee and in full control of the company.

Q. So that so far as the period prior to July, 1937, you can give us no instance of where that happened, why it happened; is that correct?

A. I know why it happened, yes.

Q. Will you tell us why?

A. The same old story, trying to meet the lowest price found in certain areas in which the company shipped.

Q. Now, does the Glens Falls Company exchange
47900 any price information with its competitors?

A. It does not.

Trial Examiner Norwood: Now, when you met that lowest price found there, was that a published price or a so-called secret price, such as a price out of line with the prices at other points?

The Witness: They were so-called secret prices.

Trial Examiner Norwood: Go ahead.

By Mr. Werle:

Q. During the period that you have been with the Glens Falls Company, does the company, or has the company had any foreknowledge of price changes which have occurred?

A. No, sir.

Q. And would you tell us whether you or the company has had any understanding or any arrangement or agreement with any other companies to quote your prices in any particular way or any particular manner?

A. We have not.

Q. Mr. Titsworth, I am showing you Commission's Exhibit 1339, which has been referred to here as the so-called Good Friday bid, and invitation for bids by the Procurement Division of the Treasury Department in March, 1938. Do you recall that invitation to bid?

A. I do.

Q. Did the Glens Falls Company submit any bid
47901 on that invitation?

A. They did not.

Q. Can you tell me why the Glens Falls Company did not bid on that invitation?

A. The company, on account of its size, could not fulfill the specifications of the offer, the proposal.

Q. Will you tell us what specifications you have in mind?

A. Why, I have in mind No. 2, as shown on the first page of conditions.

Q. Yes.

A. Cement will be ordered from time to time in such quantities as may be needed, as it is impossible to determine the precise quantities of different kinds of cement described in the specifications and proposals for supplies

that will be required during the contract term. Each bidder whose bid is accepted will be obligated to deliver all cement of the kind contracted for that may be ordered from him during the contract term. We could not afford to offer a proposal or to make a price on terms of that character to anybody. We are too small, particularly to a large consumer of cement like the Government.

Q. Will you tell me whether or not there were any other considerations on which you based your decision not to bid other than the one that you have referred to?

A. I do not think I read the bid any further than that paragraph.

47902 The Witness: May I add to my answer that I made to that question—there has been no other question—it has been called to my attention that this bid contained certain f. o. b. mill provisions. I may have known of that at the time, I do not recall, but my first answer is in every sense correct, that we could not under any circumstances bid under the terms in that paragraph to which I read.

The witness identified Resp. Ex. 3717 and Resp. Ex. 3719 as typical of invitations to bid which Glens Falls received from the New York State Department of Public Works, Division of Highways at the times shown on these invitations. These exhibits are actual or first copies of the bids that Glens Falls made on these three particular invitations, Resp. Exs. 3717 through 3719?

Q. Now, will you look at Respondents' Exhibit 3720-A to F, inclusive, and tell me whether or not that is

47903 typical of the form of invitation your company has received from the United States Government, from the War Department, at the times shown on the invitation and during your experience with the Glens Falls Company?

A. It is typical as of the time shown.

Q. Yes; that is as of December, 1936.

A. Yes.

Q. And continuing, or not continuing, up until about the middle of 1937, so far as you recall?

A. Yes, up until 1937, yes.

By Mr. Werle:

47904 Q. And does this exhibit also represent a file copy of the bid that your company submitted on that invitation?

A. Yes.

Mr. Werle: I offer Respondents' Exhibits 3717; 3718, 3719, and 3720, with subletters (handing documents to Mr. MacIntyre).

47905 Trial Examiner Norwood: You are putting these in to show that some companies and firms and State authorities asked for bids with price on delivery, delivered prices; is that correct?

Mr. Werle: I would say that these particular invitations show the manner in which these departments ask for bids as of the period testified to by the witness.

Examination on Voir Dire by Mr. MacIntyre.

Q. Mr. Titsworth, calling your attention again
47906 to Respondents' Exhibit, for identification, 3720-A-16 F, when you stated that this invitation was a typical invitation of those that you had received as of that period and down to July, 1937, from the War Department of the United States Government, what did you mean through the use of the word "typical" there?

Mr. Werle: Oh, I object, on voir dire—

Trial Examiner Norwood: The objection is overruled.

A. I think the word "standard" would fit my definition as well as the word "typical."

By Mr. MacIntyre:

Q. Well, do you mean that you used those two words in the same meaning, by the use of the word "standard" or "typical"?

A. Well, the request for bid itself states "Standard Government Form."

Q. Do you mean by the word "typical" or "standard," as you have used it, then, in connection with your testimony concerning and identifying that document that it is standard U. S. Government form?

A. Yes, sir.

Q. You do not mean by your testimony that it is typical or standard that all of the invitations that you received during that period of time from the War Department of the United States Government, or even that it is representative of those that you received from them in that it called in this particular instance for bids f. o. b. Plattsburg?

47907 Mr. Werle: Well, now, just a minute.

If Your Honor please, if Mr. MacIntyre means all the invitations were not for delivery at Pattsburg, I think that is self-evident. If he means whether or not they called for bids f. o. b. destination, then I have no objection to it.

Mr. MacIntyre: Well, I will be willing to amend my question in accordance with the suggestion of Mr. Werle.

The Witness: May I have it again, please.

Trial Examiner Norwood: Read the question.

(Question read.)

By Mr. MacIntyre:

Q. In that it called for bids only at destination.

Mr. Werle: Do I understand that you are confining that question, Mr. MacIntyre, to the period prior to July 2, 1937?

Mr. MacIntyre: I understand his statement concerned this period from December, 1936, to July, 1937.

Mr. Werle: That is correct. All right.

Mr. MacIntyre: And I am asking covering the same period.

Mr. Werle: All right.

By Mr. MacIntyre:

Q. I want you to get the question there, Mr. Witness. I said only f. o. b. destination.

47908 A. I have no recollection whatever of any other. I might answer that question by saying I do.

Q. Is it your testimony, then, that in the majority of the instances in which your company, during that period of time, received invitations such as this from the War Department of the United States Government, it specified that it wanted prices in the bids only f. o. b. to destination where the goods were to be used, and not alternate f. o. b. your mill and f. o. b. destination?

A. It is impossible for me to state definitely the first date when I saw a Government contract offering bids—asking for bids at destination or at the mill. I believe my statement is correct, during this period, but I cannot definitely set that date.

Q. You are positive, then, that the majority of those quotations that you received from the War Department of the United States Government during the period from December, 1936, to July, 1937, called for bids only at destination.

47909 A. I believe they did, but I cannot tell the date of the first quotation or request for bids I saw, which asked for it both ways.

Q. How sure are you, then, Mr. Titsworth, that this is typical of all those you received during that period from the War Department?

47910 Trial Examiner Norwood: Are you positive that that is typical?

The Witness: Yes, sir.

47911 Mr. MacIntyre: Now, as to Respondents' Exhibits 3718 and 3719, they relate to invitations dated subsequent to the issuance of the complaint.

Trial Examiner Norwood: I sustain the objection to Exhibits 3719 and 3718, and I will overrule the objection as to 3717-A to C and as to 3720-A to F.

47912 (Respondents' Exhs. 3717-A to 3717-C, and 3720-A to 3720-F, were offered and received in evidence.)

Direct Examination (Continued) by Mr. Weyle.

Q. Mr. Titsworth, I do not know whether I asked you this or not: Have you ever had any understanding or agreement with any competitors regarding the method by which you would arrive at any price to be quoted by your company?

A. I have not.

Q. Have you ever had any agreement or understanding with any competitors that your company would refrain from quoting f. o. b. mill prices?

A. I have not.

Q. Have you ever had any agreement or any understanding with any competitors that you would or would not recognize certain points as so-called basing points or bases from which prices might be figured?

A. I have not.

Q. Have you had any understanding or agreement with any competitors that the Glens Falls Company would decline to sell cement for delivery to trucks at the mill?

A. I have not.

Q. The record shows, I believe, that your com-
47913 pany is a member of The Cement Institute. As to that, have you had any agreement or understanding with any competitors—

A. No.

Q. (Continuing.) —that you would use the freight rate books of The Cement Institute in calculating prices to be quoted by your company?

A. I have not.

Q. As to your membership in The Cement Institute, will you tell me whether the activities of The Cement Institute or of your company's association with the Institute, have in any way affected the marketing policies or price policies of your company?

47914 A. They have not.

Cross-Examination by Mr. MacIntyre:

Q. Mr. Werle asked you a moment ago about the trucking policy of your company, Mr. Titsworth. Have you, since you have been connected with your company, since 1936, known it to be a policy of your company to permit dealers to whom your company sells cement to send their trucks to your mill at Glens Falls and take the cement there, you charging them a price f. o. b. their trucks at your mill?

47915 A. We have had no such policy.

By Mr. MacIntyre:

Q. In other words, your policy is that you do not permith them to send their trucks to your mill and take the cement f. o. b. your mill on their trucks?

A. That question has never come up since I have been there.

Q. In other words, it was the policy of your company when you came with it in 1936 not to sell dealers in such a manner as that?

A. We were not selling to dealers then; no, sir; nor have we since.

Q. So you continued the policy which was in effect—

A. I have.

Q. (Continuing.) —that you found when you came with the company in 1936?

A. Yes, sir.

Q. Now, Mr. Werle has asked you about your membership in The Cement Institute. You pay dues to The Cement Institute, or did during this period of 1936-1937?

A. Yes, sir.

Q. And what did you receive from The Cement Institute for what you paid them?

A. Some statistical information.

Q. Is that valuable information, from your point of view?

A. Yes.

47916 Q. To what use do you put it?

A. It is as valuable as other statistical information which I gather from all possible sources, like the Bureau of Mines, and others.

Q. Do you make any different use of it, then, than you make of the statistical information concerning the cement industry that you get from the Bureau of Mines?

A. Not the slightest.

Q. The same use?

A. Yes.

Q. Is it any more valuable than the Bureau of Mines' material?

A. No; it is a little different.

Q. In what respect?

A. It sometimes covers different periods of time; that is all.

Q. In what manner does it cover different periods of time than the Bureau of Mines does?

A. My recollection is that some of our statistical data from The Cement Institute comes twice a month whereas the Bureau of Mines furnishes the same information once a month.

Q. You have always found that The Cement Institute statistics give you the individual figures of your competitors whereas the Government's figures, the Bureau of Mines' figures, does not give you such information; is that correct?

47917 A. Yes; I think that is true.

Q. And in addition to the statistical information you receive freight rate information from The Cement Institute?

A. Yes, sir.

Q. That is, freight rate books showing rates on cement from shipping points other than your own?

A. Yes, sir.

Q. To various destinations?

A. Yes, sir.

Q. And to what use does your company put the information contained in those Cement Institute books, showing

freight rates from your competitors' mills to various destinations?

A. To the same use that we would put it to if we had to gather it ourselves.

Q. What is that?

A. Selling on destination prices, where our salesmen or customers report price changes in the field, we try to find out what caused the price changes, whether it was purely local in character or whether it was due to some change in price by some competitors, we have to meet them.

Q. Over a wide area?

A. Over a wide area.

Q. How do you determine that from the use of The Cement Institute freight rate book?

A. We sometimes use The Cement Institute
47918 books, and actually we dig in through our own traffic man.

Q. In your use of The Cement Institute on that point, you pick up a price at one point and figure it back to one of these competitors' basing points?

A. Yes.

Q. And then apply that same basing-point price, plus information shown in the Institute book, to other destinations in figuring your destination price that you would apply to these points; is that correct?

A. No.

Q. Then, how did you use it?

A. No; that is not quite what we do. If we find a change of prices in one location we check through salesmen and dealers at a good many other locations first.

Q. How many?

A. Oh, sometimes we will check as many at twenty; sometimes—

Q. Out of how many? Twenty out of how many, Mr. Titsworth?

A. We take an area where we know of one group or another group of mills that seem to have a base that they use there, and we take enough of those to cover everybody that might possibly have been responsible for that change.

Q. For, say, two or three hundred destinations; probably?

A. Well, it is—

Trial Examiner Norwood: Then you are convinced that you have found a price base; is that right?

47919 The Witness: If we have a price base, we find it that way.

Trial Examiner Norwood: And when you are convinced that you have found a price base, then you use the rates contained in the Institute book to figure out what the delivered price would be at other points not reported; is that correct?

The Witness: Actually, that is not quite correct.

Trial Examiner Norwood: What is the difference?

The Witness: We have a very able traffic man, and when this material comes in to us from the field, the checking is all done with our own railroads and with our own traffic man of those rates. We do not depend upon—that is, these freight rate books which are prepared, and which we can buy for much less than we can get them at elsewhere, are used for our first information.

Trial Examiner Norwood: Yes.

The Witness: Then we go back into our office and figure it out, checking it as we see fit.

Trial Examiner Norwood: Go ahead.

By Mr. MacIntyre:

Q. You spoke of these twenty points. Twenty points out of how many points—two or three hundred, in the area affected?

A. It is perfectly simple, Mr. MacIntyre, depending upon where these price changes seem to have taken place, to determine how many we ought to check to reach a

47920 conclusion as to the trend. Then it comes into our office and we go into the thing in a great deal more detail. Sometimes it is twenty; sometimes it is four or five; sometimes we will wait three or four days until we find the quotations over a very wide area, or we wait very frequently until our salesmen pick up new printed quotations of other companies, before we make any change ourselves.

Q. Then, when you get ready to send out quotations over a wide area, having picked up quotations at, say, four or five or twenty places, how do you arrive at the price you will put on your quotations that go to all of these hundreds of points in the entire area; that is, the hundred destinations or two hundred destinations throughout the en-

tire area? How do you arrive at the price you place on those?

A. We are enabled to determine whether the price we pick up is due to some local price that bears no relation to any published price that we have. Assuming that we have gotten by that step in our process and are convinced that it is a published price, a price to be published, then we go to work and look at those prices and we can tell eventually what they are by checking back on the delivered price; we can determine which group of mills or individual mill has made that new price.

47928 Q. Now, Mr. Werle questioned you at length concerning the freight advantage territory—

A. Yes, sir.

Q. —of your mill as against competitors, and you outlined certain territory in which your company has a freight advantage. Your company would have an advantage over a much larger territory when you consider those freight rates that you then had in mind if it quoted prices at its mills lower than your competitors quoted at their mill and let freight rates run where they would; is that correct?

47929 A. Why, certainly it is correct. If I wanted to put my prices down I wouldn't go further against the other man's freight rate. It is just a question of what prices I want to make at my mill.

By Mr. MacIntyre:

Q. So it is largely a matter of your decision as to your prices as to where you would go?

A. Where I can afford to go. I could put my prices down or put in a base, put my prices down a dollar and the mill would close, probably, in a pretty short time, but in theory that is correct.

Q. You would reach out much further than the territory you outlined?

A. The lower my price the further I reach.

Q. Much further than you outlined to Mr. Werle?

A. It simply means—putting it another way, it
47930 simply means I would go out into territory and make destination prices lower than I now have them, that is all, and that would mean in theory that my freight rate would reach further out.

Q. Now, you outlined to Mr. Werle the manner in which you determined your prices, and you stated that you determined those—that is, the price that you quoted there through your salesmen—by ascertaining through them the lowest destination prices that you must meet, and then you either meet them or not, as you see fit. That brings us back to just what we were discussing before lunch concerning your having your salesmen to pick up a few prices in the field at some distinations in a particular area and figuring back to a base.

A. No, those are two different questions, as I understand it.

Q. Now, just what did you mean by the answer you gave Mr. Werle when you said that you determined the prices that you quoted through your salesmen in the field?

A. Why, if we want to sell our cement we have to meet the lowest price that we find.

Q. Yes.

A. That is all. That is the way. They do not determine it any more than that. I determine whether I want to accept low prices if I find them.

Q. And is it your testimony, Mr. Titsworth, that your salesmen pick up in the field prices at each destina-
47931 tion where you quote before you quote there?

A. No, sir.

Q. Well, how do quote the prices at those destinations where your salesmen do not pick up for you the price quotations of your competitors?

A. I am interested as far as the salesmen are concerned in questions of price changes, destination price changes. When I find price changes, why, that information comes in and I determine whether or not, if possible, how it originated, and whether or not I want to meet it. Ordinarily, the salesmen's interest in those cases are not separately concerned.

Trial Examiner Norwood: Wait a minute. You are not answering the question.

The Witness: I am sorry. May I have the question.

Trial Examiner Norwood: Read it.

(Question read.)

Trial Examiner Norwood: Now, that is a question as to the manner of your making those prices, you see.

47932 The Witness: Those prices, we continue to make quotations on the basis of the last price information that we have from those other points.

By Mr. MacInfyre:

Q. If you pick up information from one destination or half a dozen or twenty destinations, the price change, those in a particular area, you still continue to quote prices you have been quoting at destinations in any area; is that correct?

A. No, sir.

Q. Well, will you please explain that to us?

A. I tried to explain it this morning. In case of price change, if one of our salesmen reports a change in prices, lower of prices, for example, which is all that we hear about, that information comes in to us, and then by spot checking in the particular territory where that change came, for instance, if it came in the northern part of our territory we would know there were only two or three sources, if it was a price change by some competitor that would apply there, and we would check enough points to find out which source, you see, made that change.

Does that answer your question, sir?

47933 Q. Well, then, what would do as to these other points where you have not picked up any prices in that particular area?

A. Well, as I told you, we would keep on checking until we knew whether it was, first, a local price change or whether it was a price change originating from some competitor—originating from some competitor, which is perfectly simple for us to figure in the office, the area that that price covers.

Q. And then when you do that what do you do about sending out quotations as to other points from which you haven't picked up any specific information from those points?

A. Well, I will try to say it again. I thought I had made that statement clear.

Q. I do not believe you have explained that to me, Mr. Titsworth. I would like to know—

Trial Examiner Norwood: Now, I think you explained to me this morning that you picked these prices and you determined a price base somewhere.

The Witness: Yes, sir.

Trial Examiner Norwood: Then, with respect to those localities where you have not had definite information you derive the price by the use of that base and freight applications; is that right?

The Witness: Yes, sir.

Trial Examiner Norwood: That is it?

The Witness: Yes, sir; that is correct.

47934 By Mr. MacIntyre:

Q. And on the basis of that computation you send out price quotations on a delivered price basis to those destinations; is that correct?

A. I stated that we ordinarily waited until we found written quotations of our competitors in the field before we sent out any new quotations ourselves.

Q. For each destination, Mr. Titsworth?

A. No, sir.

Trial Examiner Norwood: He has explained that.

By Mr. MacIntyre:

Q. Let us go back to the question I asked just before he answered the last one.

Mr. MacIntyre: Will you read that question before the last one, Mr. Reporter?

Trial Examiner Norwood: Read it.

(Record read.)

Mr. MacIntyre: I submit that that is not an answer to the question.

Trial Examiner Norwood: Yes. You are going back to the beginning of the story again. After you get the price, and proceed as you explained to me, the Counsel wants to know whether or not then you make out these quotations and send them out.

47935 The Witness: Yes. Well, I thought I had explained that.

Mr. Werle: I submit, Your Honor, the witness has, in response—

Trial Examiner Norwood: That is using your prices derived as you explained to me.

A. Yes, we can tell from the location, the prices—the area—

Trial Examiner Norwood: Let us not go back again to the beginning. When you get the derived prices then you broadcast your own prices; is that right?

The Witness: Yes, sir.

By Mr. MacIntyre:

Q. Based on computations that you have made up?

A. Yes, sir.

Q. Now, in stating to Mr. Werle that you compete with 25 companies, or approximately that, you mentioned in that connection a large company in Maine. You were referring to the large company's mill at Thomaston, Me.?

A. I was.

Q. And you ship cement to Thomaston, Me.?

A. I do not.

Q. What points in Maine do you ship to?

A. Very rarely ship to Maine.

Q. Well, what points do you ship to when you do ship?

A. I don't know.

Q. Do you ship to Boston?

47936 A. Yes; I ship to Boston. You asked about Maine.

Q. Do you ship to Boston regularly?

A. Yes, sir.

Q. Do you ship to points between Boston and Thomaston, Me., quite regularly?

A. In Massachusetts.

Q. Andover, up near the Maine line?

A. I can't tell you. I imagine so. I don't keep track of all our sales.

Q. Do you ship to northeastern Pennsylvania?

A. About 25,000 barrels a year.

Q. Do you have regularly customers down there?

A. We have had them for about 35 or 40 years.

Q. What changes took place in the shipping area of your company between December, 1936, and July, 1937, Mr. Titsworth?

A. Silos had been erected in Oswego, N. Y., by a western cement manufacturing company, and they used that point as a base. Their efforts were to make the points between us and them very favorable to them, and a great deal of business which we had up there we simply eliminated; we did not go into that area any more at all.

Q. Were those silos built and the use of them started by that company during the year 1936 or 1937?

A. I don't know when they were started, but they were there when I first tackled the problem.

47937 Q. You do not know why your company did not make any change in sales for the territory around Oswego before 1937?

A. No; I was not there then.

Q. The silos were there, though, before you came along?

A. The silos were there when I got there; yes, sir.

Q. Now, I want to ask you a further questions about these Cement Institute freight rate books. I do not believe that we clearly understood from what you told us this morning what use you made of The Cement Institute freight rate books or the information contained therein, showing freight rates from your competitors' mills to various destinations.

You do not use them for shipping, do you?

A. No, sir.

Q. For what purpose do you find it desirable or necessary to find that information?

A. I believe I stated that this morning. I will try to restate it.

When our salesmen run into a price change we first try to determine whether it is a local price cut or a change in price by some competitor. Now, it aids the salesman very materially in checking the matter to have these various freight rates available. It helps us, therefore, in locating the source of the price cut. We have to locate the source of the price cut to know the area that it covers and to make our price accordingly.

47938 Q. In other words, the information that I have just referred to in The Cement Institute freight rate book is being used by your company, not for shipping, but for pricing purposes.

A. Yes, sir.

Mr. Wèrle: I object to that, Your Honor, and I am going to object to any further questions of that character. Mr. MacIntyre gets an answer and then he turns around and puts it into some fancy language of his own and tries to get the witness to say that, and I do not think that is a fair way to examine the witness.

Trial Examiner Norwood: Objection overruled. It is perfectly legitimate cross-examination.

A. It is not for pricing purposes. I answered that too rapidly. It is to enable us to locate the source of our competition.

By Mr. MacIntyre:

Q. Well, let us put it in another way—

A. I am satisfied with that answer.

Q. Well, I would like to supplement it, if I can.

A. I will do the best I can.

Q. It is used by your company in connection with its pricing activities, then—we will put it that way—is that correct?

A. It is used by our company in connection with its business. If we do not get it there then we have to get it from some other source.

47939 Trial Examiner Norwood: Will you answer the question as to whether it is used in connection with its pricing activities? Is it or is it not?

The Witness: I am sorry, but I don't know whether I can—I don't quite understand the meaning of that sentence.

Trial Examiner Norwood: Well, if you can—

The Witness: I would like to have the sentence simplified, if I may. I don't understand it.

By Mr. MacIntyre:

Q. I am asking you, Mr. Titsworth, if it is a fact that your company uses the information in The Cement Institute freight rate books, showing rates from your competitors' mills to various destinations, in connection with the pricing activities of your company?

Mr. Werle: I object to that as being the same question that has been asked three times before. Mr. MacIntyre asked for the facts and he got them.

Trial Examiner Norwood: It is the same question but I do not think he has gotten a direct answer yet. Will counsel please—

Mr. Werle: The witness explained what he used it for.

Trial Examiner Norwood: I will overrule the objection.

Mr. Werle: Now he wants him to come to the
47940 conclusion that Mr. MacIntyre wants.

Trial Examiner Norwood: He has that right.

The Witness: May I ask what you mean by "pricing activities"? I don't know what that term means.

By Mr. MacIntyre:

Q. Price determination, price competition.

A. Both?

Q. Either one or both, Mr. Titsworth.

A. We use it in determining competitive prices; that is all, when we find new prices in the field, and I told you time and time again that is what we use the information for, to find out what our competitor is selling his goods for.

Q. You told us before noon that you knew of deviations that your company had made from prices openly quoted during the period from December, 1936, to July, 1937. Will you give us the date and the person to whom you made your quotations in secret, from your openly quoted prices?

A. I made no such quotations myself at all.

Q. Well, told us what you know about those that somebody else made in your company in that period of time?

A. I know of either two or three contractors.

Q. Any more?

A. That we gave special prices.

Q. Any more than two or three?

A. I don't think so; no, sir.

47943 Q. Without asking you the names of those three, Mr. Titsworth, will you please tell us what percentage of your total business was involved in such transactions during that year?

A. It was not much.

Q. Well, one percent, two percent, or three percent?

A. Our business runs—let's see—I would say probably 15 percent.

Q. Of your total business?

A. Yes.

Q. Handled on those three contracts?

A. Yes.

Q. And what percent, if any, of your business with dealers has been in such a class?

A. I know of no instance.

Q. You have not quoted any prices to your dealers secretly below your openly quoted prices—

47944 Q. Mr. Titsworth, can you cite us any instance where your company has quoted prices to dealers in that period of December, 1936, to 1937, outside of the City of New York and Boston, where your prices were not the equivalent of some basing point plus the railroad freight to that destination?

A. Yes, sir.

Q. Where?

A. Connecticut.

Q. What point in Connecticut?

A. Rhode Island.

Q. What points in Rhode Island?

47945 A. I don't know what the points were. You are referring to the arbitrary—the so-called arbitrary prices?

Q. To meet foreign competition; is that what you are talking about?

A. Yes.

Q. Outside of those along the ports, where you made special arbitrary prices to meet foreign competition, can you cite us any instance where your prices to dealers in that period of time that we have been discussing were anything other than the equivalent of the base price plus freight?

A. Do you mean by that the delivered price?

Q. Yes.

A. That is what you mean?

Q. Yes.

A. The delivered price?

Q. Yes.

A. No; I cannot.

Q. Now, with those exceptions in mind that you have just testified to, can you cite us any instance where you quoted the dealer—any of your dealers—a price lower than your openly quoted price; that is, your basing-point price, plus railroad freight to destination?

A. We have regularly quoted our dealers the destination price.

Q. Yes; except for those arbitraries that you told 47946 us are the equivalent of the base price plus freight.

A. No; no, I have not said that.

Mr. Werle: I object to that. That is not what he said.

Trial Examiner Norwood: I think that is exactly what he did say.

Mr. Werle: The witness said that he did not say it.

Mr. Wooden: But the record will show.

Mr. Werle: Yes; the record will show it.

Trial Examiner Norwood: Read the question and answer.

(Record read.)

Trial Examiner Norwood: Now; go ahead.

By Mr. MacIntyre:

Q. Where, Mr. Titsworth, except in these arbitrary zones along the coast, where you make arbitrary prices to meet foreign competition, have you quoted your dealer any price that is below an amount equivalent to a basing-point price plus railroad freight?

A. I know of no instance.

Q. Now, I want to call your attention to Respondents' exhibit—

A. Pardon me. Let me answer your question first.

Trial Examiner Norwood: Finish your answer.

By Mr. MacIntyre:

47947 Q. All right.

A. I know of no instance where we have quoted our dealers any deviation from the destination price or the lowest price we have found in the field.

Q. That is, openly quoted in the field?

A. I didn't say that.

Q. Now, you are telling us, Mr. Titsworth, that you do quote your dealers secret prices below your openly quoted prices?

A. I didn't say that; no, sir.

Q. And below the openly quoted prices of your competitors?

A. I have not said that; no, sir. We don't do that.

Q. Just what do you do?

A. We meet the lowest price that we find with our dealers.

Trial Examiner Norwood: Outside of these arbitrary zones, have you found that these prices that you have to meet were anything other than the factors of base price plus freight, except these secret prices that you have told us about?

The Witness: No.

By Mr. MacIntyre:

Q. And, Mr. Titsworth, have you found that you quoted your dealers any secret prices anywhere?

47948 A. We have in no instance done other than to meet the price found at destination. We have made no special prices, secret prices, of our own, if that is what you mean.

By Mr. MacIntyre:

Q. To dealers?

A. Yes; to dealers. We are talking about dealers now.

Q. Yes.

A. Yes.

Q. You made openly quoted prices that met your competitors' prices at destination with respect to your

47949 dealers in all instances?

A. That is not what I said.

Q. Well, is that the fact?

A. Well, I answered your other question. This is another question.

47951 Q. I am asking you now, Mr. Titsworth, whether or not you quoted your dealers or whether your company quoted your dealers, in the period of time that you went with it, in December, 1936, to July, 1937, any prices below your openly quoted prices?

A. I can't answer that question.

Q. You don't know?

A. I don't know. I don't know. I will tell you why.

Q. No, I think that is—

A. I don't know.

Q. You told Mr. Werle on direct that you were well acquainted with the pricing policies of your company.

A. I am.

Q. Does not this fit into the pricing policy of your company?

A. Yes; but you are asking me about a certain period of time, years ago. I tried to state it. I will try to answer your question a little more freely than that.

We have not initiated any prices. Is that a fair answer; does that suit; does that tell you what you want to know?

Q. When you say you have not initiated prices, are you talking about—

A. I am talking about policies—

Q. You are talking about initiating published prices at the time?

47952 A. I am talking about special prices. I am not prepared to say today that in that period from December, 1936, to the middle of 1937, whatever the date is, our competition with our dealer business did not warrant us meeting some prices that we found in the field that were different from any published, so-called published prices.

Q. Are you saying that it did?

A. I am not saying that it did. I am saying it may have.

Q. But you don't know?

A. I don't know. Certainly I cannot talk for each price change.

Q. And you cannot cite us any instance where they did?

A. No.

Q. Now, referring to Commission's Exhibit 1339, which

is the form of invitation that you stated your company received from the Procurement Division of the United States Government during March or April, 1938, that long invitation, you told Mr. Werle that the reason you did not bid on that was because, under paragraph 2, it required delivery—

A. Yes, sir.

Q. —in an indefinite manner.

A. Yes, sir.

Q. I think that is the substance of your testimony.

A. I read right from the request for the bid.

Q. Why was it that you did not consider that you
47953 could have named a maximum quantity in your bid of, say, 25,000 barrels or 10,000 barrels that you could have delivered at any time on order?

A. I was not asked to do that. If the Government had asked it I could have done it, but it never entered my head.

Q. The Government asked you to bid on anywhere up to 3,000,000 and you could have bid on anything else than 3,000,000, on a day or a two or three week or a month basis. Did you not consider it from that angle?

A. No, I did not. I would not accept as indefinite an order as that from anybody. You just can't do it. You can't tell when it would be shipped.

Q. Did you not consider making it for a definite quantity, such as 10,000 barrels or 5,000 barrels?

A. No, I did not.

Q. You did not give that any consideration?

A. On that basis—let me tell why I gave it no consideration. On 3,000,000 barrels of business, 10,000 or 15,000 or 20,000 barrels of cement means nothing.

Q. You considered it would mean nothing?

A. Why, yes.

Q. You did not think the Government expected you to furnish all of the cement to the entire United States on 3,000,000 barrels, did you?

A. Well, I know perfectly well that they did not.
47954 Q. And you knew that they expected you to bid on any amount under that that you felt that you could furnish; is that correct?

A. They did not say when they wanted it, or how much; they did not say how much they wanted in our territory, or give us any period.

Q. You did not consider giving them a bid on any small quantity?

A. No.

Q. You said that while you did not read it in the invitation you can recollect that there was probably said in the invitation about an f.o.b. mill bid. Do you recall that testimony of yours?

A. I do; yes, sir.

Q. Where did you get the impression that you read it in the invitation that it called for f.o.b. mill bids?

A. My counsel mentioned it this morning.

Q. That is the first you had heard of it?

A. I had not seen that bid since the date I first passed on it, and asked for a copy of the bid to look at it. I had heard about it in the testimony at various times, and he gave it to me and told me.

Q. You did not know until he told you this morning that it called for an f.o.b. mill bid?

A. I probably knew it at the time but had for-
47955 gotten it. It made no impression on me.

Q. You do not know whether you read it in the invitation at that time or not?

A. It doesn't make the slightest difference to me at all.

Q. You make f.o.b. mill bids to other people?

A. We have not; no, sir.

Q. It has been your policy to quote prices only on destination prices?

A. Yes, sir; and on definite amounts and dates.

Q. And at specific destinations?

A. Yes, sir.

Q. Has your company, since you have been with it, submitted bids to State Governments or to contractors working for Sate Governments, on period requirements, three months or a year?

A. Yes, sir.

Q. And you gave only destination price bid quotations at those destinations?

A. Yes, sir.

Q. For the requirements of three months, six months, or a year?

A. No; for specific amounts—no, not for requirements in any of them—for specific amounts of cement for specific jobs.

Q. Up to a specified amount; is that correct? They are not required to take every bill you make a bid on; is that correct?

A. Well, it runs 5 percent, more or less, ordi-
47956 narily. The State engineers are very careful in their specifications as to the exact amount required. It frequently will run within 1½ percent.

Q. When you bid to the contractor doing State work, you do not know the amount of cement down to the particular hundred of barrels that he is going to take?

A. Certainly not.

Q. And when you take requirement contracts, period contracts from block manufacturers, you do not know how many barrels of cement they are going to use in a particular period; do you?

A. No, sir.

Q. If they—

A. You have got a fair idea of it.

Q. But if a block manufacturer—

A. It is not as close as stated here, but you have a very fair idea of their requirements.

Q. But if a block manufacturer was accustomed to taking a hundred thousand barrels in a year, 25,000 barrels in three months, or, say, 40 percent in the busiest three months of the year, from you, and you entered into a contract to serve that block manufacturer for that busiest three months' period, you would expect to serve him 40,000 barrels or thereabouts; is that correct?

47957 Q. You would expect to serve him 40,000 barrels in that busiest three months' period?

A. Well, certainly, before we sell it we want to know what he is going to use, before we sign any requirements contract.

Trial Examiner Norwood: In other words, you would not sell on an estimate?

The Witness: I would, to somebody I knew, who was accurate in his estimates, very gladly.

By Mr. MacIntyre:

Q. In the case of the block contractor, can he give you his estimate of what he is expecting today for the ensuing three months?

A. They come pretty close to it, some of them. I am not after the speculative business of block manufacturers at all; never have been. I am not interested in speculative contracts on my books. They don't mean anything.

47958 Q. Except for these services of The Cement Institute freight rate books and statistical information, what do you receive from The Cement Institute for the money that you pay to it?

A. Nothing, to my knowledge.

Redirect Examination by Mr. Wade.

Q. I do not know whether this is clear or not, but who has determined the policies and practices of the Glens Falls Company during the period that you have been with the company?

A. I have.

Q. Now, Mr. MacIntyre asked you a question about varying the area in which you have a freight advantage by changing your prices. Did you mean by that to imply that by changing your price you could change the freight rates from your mill?

A. No, sir. I might get more business for a
47959 little while if I lowered my prices.

Q. But the freight rates are fixed?

A. Haven't anything to do with it.

Q. On this f.o.b. mill bid question, during the period between December of 1936 and July of 1937, do you recall that your company received any requests for f.o.b. mill bids from any kind of customer?

A. I do not.

47960 J. A. POHLING was thereupon recalled as a witness for the Respondents, and, having been previously sworn, testified as follows:

Direct Examination by Mr. Withrow.

47961 The witness identified Resp. Ex. 3741 as having been made by him. The source of the information contained in Resp. Ex. 3741 was a publication entitled "Construction Industry" issued by the United States Department of Commerce, Bureau of the Census. It was taken in the year 1930, the figures regarding construction are for the year 1929. The fifteenth census of the United States, 1930, Construction Industry, is the book that was used. He has found in that volume as source material all

of the figures which I have contained here on the face of Resp. Ex. 3741. He vouches for the accuracy of Resp. Ex. 3741. He further identifies Resp. Ex. 3742 A B as having been prepared by him. The source of the ma-
47962 terial contained in that tabulation was the same publication, Construction Industry, issued by the Department of Commerce. He took those figures contained in there from that source. He can vouch for the accuracy of Resp. Ex. 3742. Under each heading on Resp. Ex. 3741 he has divided for business over $25,000, and for business under $25,000. That classification is in the source material.

Mr. Wooden: We object to these documents as incompetent, irrelevant, and immaterial; as being merely secondary information compiled for the purpose of this case and falling into the category of briefing based upon census reports of which judicial notice can be taken, and arguments based upon such reports being made in the briefs, and the point about briefing is, Your Honor, if both sides had been allowed to put in this freely and equally there would not be any objection, but we being pre-
47963 cluded from it, and if they are allowed to put briefing material into the evidence it saves that much space in the brief.

47964 Trial Examiner Norwood: I think I will sustain the objection to this. You have it marked there. You may show it to the Commission.

47979 Washington, D. C.
Tuesday, November 12, 1940.

47982 (RESP. EX. 355-A to 355-E was offered and received in evidence.)
47990 (RESP. EX. 3739 was offered and received in evidence.)
48002 (RESP. EX. 3750-A to 3750-R was offered and received in evidence.)

48013 WILLIAM R. BLOCHER, called as a witness for the Respondents, being first duly sworn, testified as follows:

Direct Examination by Mr. Withrow.

I am William R. Blocher. I am employed by The Cement Institute as manager of the Freight Rate Bureau, Cement Institute, Chicago, Illinois, and have held
48014 that position since the early part of 1939.

48016 By Mr. Withrow:

Q. Mr. Blocher, I show you Respondents' Exhibit 3755, for identification. Was that prepared in your office in Chicago, the Freight Rate Bureau of the Institute (handing document to the witness)?

A. This correction sheet was prepared in the Chicago office of The Cement Institute.

Q. Was that correction sheet sent out to the subscribers?

A. It was sent out to the subscribers to the Missouri rate book.

Q. Mr. Blocher, I show you Commission's Exhibit 3024, and I show you correction sheet No. 63, and ask you if that sheet refers to Respondents' Exhibit 3755, being correction sheet 62?

A. Correction sheet No. 33, issued March 24th, canceled No. 62 in its entirety. This was done due to the fact that these three stations in the body of the correction sheet No. 63 were made on a combination basis; in other words, a cent had to be added to the rates to the junction, and plus a cent to the rates—or plus rates beyond the junction.

Q. Could you tell us by looking at correction sheet 62 and correction sheet 63 whether they were issued before the effective date of those rate changes?

48017 A. Both correction sheets were issued prior to the effective date of same.

Trial Examiner Norwood: How do you know that?

The Witness: The date is shown.

Trial Examiner Norwood: By the notation on the correction sheet?

The Witness: The effective date is shown on the correction sheet.

By Mr. Withrow:

Q. Is the issued date also shown?

A. The issued date is also shown.

48018 *Examination on Voir Dire by Mr. Wooden.*

Q. This pencil handwriting on Respondents' Exhibit 3755, whose is that, Mr. Blocher?

Mr. Withrow: Your Honor, I object. The pencil handwriting is not offered in evidence. I do not think we should waste time on voir dire on that.

Trial Examiner Norwood: Objection overruled.

The Witness: I never saw the handwriting on this correction sheet before.

By Mr. Wooden:

Q. You do not know whose it is?

A. No, sir.

Q. These rates in both cases; that is, correction sheet 63 and correction sheet 62, relate exclusively to intrastate rates?

A. These correction sheets relate to interstate rates, and you will notice in the exception it states:

"We do not have definite advice of the effective date on intrastate traffic."

Q. They both relate exclusively, then, to interstate rates, or to both interstate and intrastate?

48019 A. To interstate.

Q. To interstate only?

A. Yes, sir.

Trial Examiner Norwood: You were saying "intrastate" in each case, were you?

Mr. Withrow: Interstate.
The Witness: Interstate, i-n-t-e-r-s-t-a-t-e.
Mr. Withrow: Mr. Wooden referred to intrastate.
Trial Examiner Norwood: I see.

By Mr. Wooden:

Q. You cannot testify, then, Mr. Blocher, that on intrastate rate the changes had become effective before or after the issuance of these two correction sheets?

A. The increase in Missouri became effective May 16th.

By Mr. Wooden:

Q. Well, you cannot tell from these two sheets, Respondents' Exhibit 3755, for identification and correction sheet No. 63, in the Missouri rate book No. 3, whether it
48020 became effective before or after the issuance of those correction sheets?

A. Well, in the exception it states: "We will advise you promptly when we receive authoritative information concerning effective dates on intrastate traffic."

And supplement 65 comes along, issued May 10th, and makes the effective date on intrastate traffic May 16th.

Q. You are testifying as to the dates of issuance of these documents by reason of seeing the dates shown on them; is that correct?

A. That is correct, which is followed by the Commission's orders.

Q. In other words, you have no independent recollection that those papers were issued on the dates shown on them?

A. I just don't know what the question is.

Q. I mean, your testimony is based upon the fact that you see the dates on the documents, and then you testified that they were issued on those dates, but you do not have any independent recollection that those documents were issued on those dates, apart from your seeing the dates on the documents; is that true?

A. No; I don't have any recollection now.

Direct Examination (Continued) by Mr. Withrow.

Q. Mr. Blocher, what has been the custom in your office with reference to including the issuance date on the
48021 face of the correction sheet?

A. Well, we always try to issue the supplements

just as soon as we get information from the State commissions in order to give the member companies sufficient time to change their rates.

Q. On what date from the issued date do you put it on?

A. Just as soon as I receive information from the railroad or the commission that the rates are going to become effective, I issue a correction sheet as soon as I receive authentic information.

Q. This correction sheet No. 63 was issued on March 23, 1938. Can you tell us whether or not it was, as a fact, mailed on or about March 23, 1938?

A. All the correction sheets are mailed on the date of issuance.

Q. Can you tell us by looking at any one of these, and refreshing your recollection, as to on what date the specific sheets were mailed, by looking at the issued date?

A. The correction sheet No. 62 was issued March 23, and it was mailed on the same date, and correction sheet No. 63 was issued March 24 and mailed on the same day.

48022 (RESP. EX. 3755, was offered and received in evidence.)

By Mr. Withrow:

Q. Mr. Blocher, I show you Respondents' Exhibits 3756 to 3763 and ask you to tell us if you prepared these documents (handing documents to the witness)?

A. These documents were prepared by me.

Q. And do you vouch for their accuracy?

A. I do.

Q. And is the information from which you prepared these on file with the Interstate Commerce Commission, or in an appropriate State commission covering the railroads?

A. The authorities contained in these documents are tariffs on file with the various State commissions and orders of various State dockets.

48028 (RESP. EXS. 3758 to 3763, inclusive, were offered and received in evidence.)

Q. Mr. Blocher, I will ask you to look at Respondents' Exhibit 3757 and refresh your recollection and state whether or not the State of North Dakota issued any order authorizing the intrastate application of this emergency increase in Ex Parte 103, 115, 118 and 123?

A. There was no intrastate order issued pertaining to State rates on cement in the State of North Dakota.

Q. How about the State of New Mexico?

A. That applies likewise.

Q. I show you Respondents' Exhibits 3564 to 3565-A to F, inclusive, and ask you if they were prepared in your office (handing exhibits to the witness)?

A. Yes; this Kentucky rate book was prepared in our office.

Q. Now, Mr. Blocher—

48029 Q. Mr. Blocher, would you tell us whether the rates contained in that rate book are on the same scale as was in effect, say, around January, 1933?

A. Well, in January, 1933, the rates from Kosmosdale were checked in under scale No. 12710, which went into effect in January, 1935.

Q. Did 12710 remain in effect in Kentucky? I mean, it is still in effect in Kentucky?

A. No; scale of rates in Kentucky today is 12806, which became effective in 1937, and which is known as the Southern scale.

Q. Before 12710 became effective, were the rates from Kosmosdale on the old Southern rate scale?

A. Yes.

Q. So that, to summarize it, to see if I have it correct, the rates contained in that rate book in front of you are rates figured on the Southern rate scale, which is the scale which was also in effect prior to this interval when they had 12710?

A. That is right.

Q. And do you vouch for the accuracy of the rates contained in Respondents' Exhibits 3564 and 3565?

48030 A. To the best of my knowledge and ability, I do.

Examination on Voir Dire by Mr. Wooden.

Q. Mr. Blocher, when, during 1937, did this 12710 rate from Kosmosdale go into effect?

A. I just do not recall the exact month.

Q. Can you say what time of the year it was?

A. No, I could not even do that.

Q. Whether it was the first month of the year or the last part of the last month of the year?

A. I would not attempt even to make a guess.

48034 *Direct Examination (Continued) by Mr. Withrow.*

Q. Mr. Blocher, you heard what Mr. MacIntyre said. I would like to ask you one question: Was this rate scale before the 12710 and the rate scale which is shown in Respondents' Exhibit 3564 and Respondents' Exhibit 3565; were those two scales the same or were they different—that is, prior to 12710 and after?

A. They were the same scale.

By Mr. Wooden:

Q. Do I understand from that that 12710 made no change in the prescribed rate?

Mr. Withrow: Just a minute. I object.

Trial Examiner Norwood: That this was a reestablishment of—a complete reestablishment of rates that obtained prior to the issuance of the complaint; is that

48035 what he testifies to here?

The Witness: That is right. I gave the—

Mr. Withrow: Your Honor, I offer to prove through this witness, and through Witness Pohling, and on the basis of Respondents' Exhibit 3562, 3563, 3564, 3565, and 3566, the rate scale in the State of Kentucky, and I further offer to prove through these documents that one of the factors affecting selling methods of the Kosmos Portland Cement Company is this rate scale, and that in the territory of Kentucky there are only a very small percentage of the railroad stations in that State to which Kosmosdale has a lower freight rate, Kosmosdale being the mill town of the Kosmos Portland Cement Company, that at all other stations in the State there is at least one mill which has advantageous freight rates, and that in a large part of the State of Kentucky other mills have more favorable freight rates than the Kosmos mill, and I further offer to prove through these exhibits referred to that to none of the large towns in the State of Kentucky does the Kosmos Company have a freight advantage.

48036 By Mr. Withrow:

Q. Mr. Blocher; now just one or two more questions:

A minute ago you were testifying about the practice in your office about the issue date on the correction sheets in so far as correction sheets 62 and 63 to the Missouri rate

were concerned. Did that testimony also apply to all the correction sheets you issued from your office?

A. It does.

48037 *Cross-Examination by Mr. Wooden.*

Q. Mr. Blocher, it is true, isn't it, that ordinarily changes in freight rates are announced to go into effect on 30 days thereafter the announcement?

A. Well, there are some exceptions when special permission is granted.

Q. But outside of those special exceptions?

A. That is a fact.

Q. The 30-day notice of the effective date is required, isn't it?

A. Yes.

Q. In view of that, how do you explain the use on a number of your correction sheets of "effective immediately"?

48038 Trial Examiner Norwood: Do you recall that the sheets were as described there?

The Witness: There may be some.

Trial Examiner Norwood: Well, I think you might show him those.

By Mr. Wooden:

Q. Well, you know it was rarely a common occurrence for you to issue correction sheets containing corrections indicating that they were effective immediately, didn't you?

48039 A. Well, there are some instances where stations have been abandoned or l.c.l. stations where you can't ship to these stations; they have been abandoned for several months, and as long as the stations are not in existence, why, I did not think it would be necessary to trace back the effective date so, therefore, I made them effective at once.

By Mr. Wooden:

Q. As a matter of fact, there are carload rates on which you issue correction sheets effective immediately, have there not been?

48040 A. I would say there has been.

By Mr. Wooden:

Q. Well, now, then, why is it in such cases that you make the corrections effective immediately in view of the prevailing practice that changes in freight rates are effective immediately only on 30 days' notice?

A. The reason I do that is because the rate probably was an error, and I wanted to send out the notices as soon as I found out that these rates were in error and I made it effective at once.

By Mr. Wooden:

Q. An error where? On whose part?

A. A typographical error, probably.

Q. An error in your office, you mean?

A. That is right.

Redirect Examination by Mr. Withrow:

15041 Q. Mr. Blocher, just one question. You referred to typographical errors. Have you found over a period of 40 years that you have been operating this rate bureau many such typographical errors?

Q. Well, in proportion to the number of rates you publish.

A. I would say there was not very many typographical errors.

Recross Examination by Mr. Wooden.

Q. Well, as a matter of fact, Mr. Blocher, when you said "not many," did you mean not many in proportion to the total number of net rates issued by your office?

A. Yes.

Q. As a matter of fact, there were considerable numbers of such sheets without regard to the proportion they bore to the total?

A. Well, I don't—

Mr. Withrow: Just a minute. Are you talking about sheets or errors, Mr. Wooden?

15042 Mr. Wooden: Sheet—making corrections effective immediately I am speaking about.

Mr. Withrow: Your Honor, I object to the question because it assumes the witness testified every correction effective at once was an error, and that is not the testimony.

Trial Examiner Norwood: The objection is overruled. Let us straighten this out.

Answer the question.

The Witness: What was the question?

Trial Examiner Norwood: Read the question.

(Question read.)

Mr. Withrow: I submit the question is not understandable.

Trial Examiner Norwood: I think the Counsel can clarify that for us.

By Mr. Wooden:

Q. Well, as a matter of fact, over a period of years you issued scores of correction sheets effective immediately, didn't you?

A. I do not recall whether it would be scores.

Q. Sceres, even hundreds?

A. I would not say to that.

Q. You just do not have any very definite idea?

A. That is right.

4804 Mr. Wooden: That is all.

Trial Examiner Norwood: Would you refer to the typographical errors in these statements there that have occurred in the last 10 years has been numerous or considerable, or just what?

The Witness: Oh, I would not say they would be numerous.

Trial Examiner Norwood: Would you say occasional?

The Witness: I would say occasional, yes.

Redirect Examination by Mr. Withrow.

Q. Mr Blocher, you have given, I think, several reasons, but to have the record straight I want to ask you one more question: Are all the sheets where it says "effective at once," do all of those sheets include such typographical errors or are there other reasons?

A. There are other reasons for those correction sheets, also. There would be some additions of rates from various mills, and they, therefore, would be also effective at once.

Mr Withrow: That is all

Recross Examination by Mr. Wooden.

Q. Well, you mean that there are some additional rates to which correction sheets were applied that were out of category of typographical errors?

48044 A. Yes.

48046 FREDERICK W. SCHOLZ, called as a witness for the Respondents, being first duly sworn, testified as follows:

Direct Examination by Mr. Bond.

I am a certified public accountant of the State of New York, and reside in New York. I am senior partner of the firm of Quinn-Barren & Company, 17 East 42nd Street, New York City. I am a certified public accountant.

48047 I received my certificate in June 1925.

I received my B.A. degree in 1911 at Columbia University, and the Master of Arts degree in 1912 at Columbia University. I entered the profession of public accounting in 1917. At about the same time 1917, I began teaching accounting at Columbia University and am still teaching there. In my public accounting practice, I audited manufacturing concerns of various types, mercantile companies, and I did a good deal of investigating of special lines. Several times I assisted counsel as special investigator on an accounting question before the Securities and Exchange Commission, and in several cases before the United States District Court, Southern District. For about 6 years I have been a special accountant for the Corporation Counsel of the City of New York, contract division investigating cases were contractors brought damage suits against the City of New York, and, besides that, we do considerable work in tax questions, both federal and state, social security taxes, and so forth. I am familiar with the literature in the field of accountancy.

48047 Mr. Bond: I tender the witness as a duly qualified expert in the field of accountancy.

Mr. Wooden: With no objection to his acceptance in that field as an expert.

Trial Examiner Norwood: He is so accepted.

48048 By Mr. Bond:

Q. Mr. Scholz, I will ask you to assume that cement is usually invoiced to the purchaser at a delivered price, including the cost of rail transportation to the delivery point, that the amount of such freight is shown upon the invoice as a separate item deducted from the total invoice price, that the purchaser pays the amount of such freight to the railroad company and remits the balance of the invoice price to the seller, and assume further that certain cement companies have entered upon their books only the amount remitted to them on each sale and have thus omitted the item of freight as a part of the debit to the consumer, and also the offsetting item of freight paid as a credit to the customer's account: In your opinion as an expert in the field of accountancy are such accounting practices consistent with sound accounting principles?

A. Taking the conditions as outlined, I would say it is sound accounting practice to follow such procedure in accounting and on the books.

48049 J. A. POHLING, was thereupon recalled as a witness for the Respondents, and, having been previously sworn, testified further as follows:

The witness identified Resp. Ex. 3764-A to E as a document which he had prepared using as a source a publication entitled "Mineral Resources of the United States", and also the Minerals Year Book, issued by the United States Bureau of Mines.

The witness identified Resp. Ex. 3765-A to C as a tabulation which he had prepared from the same source.

48050 He vouches for the accuracy of Resp. Ex. 3764-A to E and Resp. Ex. 3765-A to C.

48051 (RESP. EXS. 3764-A to 3764-E and 3765-A to 3765-C were offered and received in evidence.)

Direct Examination (Continued) by Mr. Withrow.

Q. Mr. Pohling, one question: I notice that Respondents' Exhibit 3764 starts the year 1910. Did you make
48052 any effort to go back of 1910 for this survey?

A. Yes, I did.

Q. And would you tell us why you did not tabulate the information before 1910?

A. In 1910, that was the first year a complete listing was made of Portland cement plants in this country. Previous to that they were involved with natural cement producers and the figures were inaccurate and reports were contradictory throughout all the volume.

Mr. Brick: If Your Honor please, I offer as a Respondents' exhibit, Commission's Exhibit, for identification, 839-R, S, and T, that being a letter from Mr. John Treanor to Commissioner Ferguson, and being a part of the correspondence between those gentlemen in August of 1934 when negotiations were under way with regard to a joint investigation of the industry by the Commission and by the industry itself.

Trial Examiner Norwood: Does that tie up in
48053 any way with any of his correspondence that the Commission has put in?

Mr. Brick: Yes, sir; through the subpoenas issued by the Commission, most of the correspondence I take it were turned over by the Riverside Company, of which the late John Treanor had been president. There may be other correspondence in the hands of the Commission which is not brought to our attention, but Mr. Wooden offered a number of documents from that correspondence, and I assume that in the course of his selection he offered those which he considered favorable to them and excluded those which were not. This is one of those which he did not offer.

Mr. Wooden: May I inquire from what company's files this document came?

Mr. Brick: Well, I imagine that—well, the numbers—I have stated the number, Mr. Wooden, and I think that Mr. MacIntyre's records will indicate the company.

Trial Examiner Norwood: It was turned in pursuant to a subpoena.

Mr. Wooden: Will you say it is from the company's files which presented it under the subpoena duces tecum, then?

Mr. Brick: Well, I think so. Is there anything unusual about it? It contains a Commission's identification number, so it was the Commission that had it identified.
48054 We did not.

Mr. Wooden: It was produced by the Lehigh Company from its files, was it not?

Mr. Brick: I do not know. What does your record show?

Mr. Wooden: I think that is what it shows.

Your Honor, I object to the document as irrelevant and immaterial, and as containing nothing which adds anything to—throws any light upon the issues involved in this case, merely relates to an effort made by Mr. Treanor to induce the Federal Trade Commission to make an economic investigation of the basing-point system.

Mr. Brick: Well, at one time Mr. Wooden—I think it is a little unfair to the Examiner to state your position in that manner. At one time the Commission indicated that it would undertake such a joint survey. Now, I do not see any point in our having a controversy on that point.

Now, we have been before the Commission and I think the Commission understands just what it was, certainly Commissioner Ferguson does, and I think it is only fair to the Commissioner and to the Respondents to have all of the correspondence in the record which related to those particular negotiations. Now, I am sure that Mr. Wooden's
48055 reason for objecting to this document is that it contains the statement that Mr. Treanor was not representing the industry. Now, Commissioner Ferguson knows very well whether he was or was not.

Trial Examiner Norwood: You mean when he sent his famous telegram?

Mr. Brick: No, this has to do—

Trial Examiner Norwood: Does this have anything to do with that?

Mr. Brick: No, you see this was in August, 1934, Judge.

Mr. Wooden: This was a few weeks after that.

Trial Examiner Norwood: Just from the standpoint of fairness they have a telegram here saying that, wherein Mr. Treanor says that industry should be permitted to restrain trade, or something to that effect. Now, if this goes further in his attitude on that, or explains that attitude, or explains it away, wouldn't it be fair to receive it?

Mr. Brick: Yes, I think it would.

Mr. Wooden: I do not understand that it explains anything away at all, Your Honor. I do not know what you are talking about.

Mr. Brick: I will ask Mr. Wooden to concede the fact—

Trial Examiner Norwood: Well, Mr. Treanor is
48056 the one that sent that telegram about restraining trade, about sheer bunk and hypocrisy.

Mr. Wooden: That was a letter written on May 7, 1934.

Trial Examiner Norwood: Now, doesn't this throw further light upon the attitude displayed in that?

Mr. Wooden: Well, if it does, I can't see that it does anything except add some more material of the same sort characterized in his famous letter.

Trial Examiner Norwood: Inasmuch as he is dead and if this goes into any feature of that same subject it might be well to consider it although here he is speaking to a different forum.

Mr. Wooden: It makes it self-serving.

Trial Examiner Norwood: Yes.

Mr. Brick: How about the letter?

Trial Examiner Norwood: Did you have this marked as Respondents' exhibit?

Mr. Brick: No, not yet. It is a Commission's mark.

Trial Examiner Norwood: Commission's Exhibit 839-R to T shall be marked Respondents' Exhibit 3766-A to C.

48057 (RESP. EX. 3766-A, 3766-B, and 3766-C was offered and received in evidence.)

48069 Mr. Brick: Now, as another offer, which is sep-
48070 arate from the testimony of General Goathals, I offer Respondents' Exhibit 376-A, for identification, beginning at the middle of page 6, and beginning with the testimony of Edward N. Hurley, continuing through page 7, through page 8, and all of page 9, all of page 10 to the bottom of the page, excluding on that page folio 484, which refers to exhibit, and including the last two lines on page 13, and the first two paragraphs on page 14.

Now, in connection with that offer, if Your Honor please, Mr. Hurley, who had been Chairman of the Federal Trade Commission between 1915 and 1917, states—

Mr. Wooden: That is incorrect in that he was not Chairman during that period.

Mr. Brick: With Your Honor's permission, I will stand corrected.

Trial Examiner Norwood: Change that; the Chairman never serves but one year.

Mr. Wooden: He did in those years, but Davies was chairman during that period.

Mr. Brick: Well, he was Commissioner between 1915 and 1917, and in his testimony Commissioner Hurley speaks of how the Federal Trade Commission urged members of industry to join trade associations.

48071 Mr. Brick: I would like, if I may be permitted, if Your Honor please, to follow a practice which was certainly followed on many occasions by Mr. Wooden, to state to Your Honor the purpose for which we are offering the exhibit, and in so doing to make such references as we think are necessary, and giving you the gist of the matter contained in the exhibit so that it will tie up with what we have to say about it.

Trial Examiner Norwood: Counsel may do so if it is necessary to refer to it to describe it, to identify it, or to make its purpose apparent.

Mr. Brick: And it also treats of how the Federal Trade Commission urged members of industry to cooperate in gathering and publishing statistics in connection with production, stocks on hand, shipments, and matters of that kind, and also on how the Federal Trade Commission urged and assisted members of industry in originating and maintaining standard and uniform methods of cost accounting, and in assembling credit information and other matters of that kind, which the Commissioner, through his testimony, showed that he had urged upon industry generally, and his testimony also covers the necessity of manufacturers treating the dealers uniformly because they are well
48072 informed buyers, and also that an industry should earn about 15 percent on its invested capital, making provision for expansion and reserves for coming years.

If Your Honor reads this testimony which is in the offer I am now making, I think Your Honor will be impressed with the differences in view between the attitude of the Commission as expressed by Commissioner Hurley and the position taken by Mr. Wooden in connection with many of the matters which he has directly and impliedly criticized as matters which have taken place in the cement industry through cooperation among its members.

48079 Mr. Withrow: Your Honor, at this time I offer in evidence Respondents' Exhibits 3769 through 3781, all for identification, and on pages, the tabulation of shipments of domestic Portland cement from mills into States and per capita in barrels for various years. These pages were previously marked Commission's Exhibits numbers, some Commission's No. 3280 to 3291 being pages out of documents previously marked Respondents' exhibits starting 3496 through 3507, for identification, and Your Honor will recall we had some cross-examination and identification apparently by Mr. Pohling of questions being asked

by Mr. Wooden. We are offering at this time, and we will ask the privilege to substitute photostatic pages of the specific pages if they are received in evidence (handing documents to Mr. Wooden).

Mr. Wooden: I understand this offer comprehends all the portions of the Bureau of Mines' reports that we had marked as Commission's exhibits, for identification, and are now being offered as Respondents' exhibits; is that correct?

Mr. Withrow: Well, I believe so, Mr. Wooden, but I would not want to make representation that it did.

48080 I think you had better check that. I think here may be one or two other pages you had marked. I would not want to say definitely. I think they are.

Mr. Wooden: Well, in any event, we have no objection; if there are some pages—

Trial Examiner Norwood: Is that Respondents' Exhibits 3769 to 3781?

Trial Examiner Norwood: They are received as marked.

(RESP. EXS. 3769, 3770, 3771-A, 3771-B, 3772-A, 3772-B, 3773, 3774, 3775, 3776-A and 3776-B, 3777-A, 3777-B, 3778-A, 3778-B, 3779, 3780, and 3781, were offered and received in evidence.)

48098 It is hereby stipulated and agreed that Eugene Blum, president of the Coplay Cement Manufacturing Company (hereinafter referred to as "the company") shall be deemed to have given testimony in this proceeding as follows:

1. Witness determines the policies of the Company. Witness has been a director of the Company since 1922 and president since 1926.

2. None of the officers or directors of the Company are or have ever been officers or directors of any other cement company. The Company is not, and has not been, affiliated in any way with any other cement producing or selling company.

3. The Company is the oldest manufacturer of Portland cement in the United States, production of Portland Cement at Coplay, Pa., having been begun about 1870. The Company has one plant which consists of two units, one at Coplay, Pa., and the other at Saylor, Pa. The quarry is located at the mill. The principal office of

48099 the Company is at Coplay, Pa. The Company also maintains sales offices in New York, Philadelphia

and Boston. The Company has never had any warehouses, silos or distributing points other than the storage silos at its plant. The Company's plant at Coplay, Pa., is situated approximately one mile from Northampton, Pa.

4. The Company has never had any understanding or agreement with any competitor with regard to the establishment, maintenance or recognition of any particular mill as a basing mill or with regard to the amount of any mill base or with regard to the prices it will charge for its cement. The Company has never had any understanding or agreement with any competitor to quote prices f. o. b. destination or in accordance with any particular method of pricing or marketing. The Coplay Company has never at any time agreed with any competitor, either expressly or impliedly, directly or indirectly, to quote the same price as such competitor for cement at any place, or to any customer, or to make the same bid for any public contract.

5. The Company has never bid in any territory involving land grant rates. The Company has never used any so-called control clause.

6. As of July 1, 1937, the Company was covering its sales area with twenty-two salesmen. This is the largest sales staff employed since witness has been with the Company.

7. The Company joined The Cement Institute on June 15, 1933. None of the officers, directors or employees
48100 of the Company has ever been an officer or trustee or ever served on any committee of The Cement Institute. The Company has never had any agreement or understanding with any of its competitors regarding the use of statistics.

8. The Company's plant has eight kilns, dry process. As reported to the Federal Trade Commission on January 27, 1932, the Company estimates its capacity at 2,400,000 barrels, which estimate is based on operating experience, since witness has been with the Company. There have been no changes in the capacity of the Company's plant since witness has been with the Company, except such increase as was due to improved operation of existing units. The Company has never had any agreement or understanding as to the amount of clinker or cement that it would or would not produce. The Company has never traded any order with any other cement company nor has it ever had any agreement to do so.

9. Sales to dealers are made to those who in the opinion of the management are dealers generally in building material, and have the warehousing facilities and equipment and service necessary to distribute the cement to the consumer. In New England the Company sells to some dealers in hardware, and in flour, feed, and grain. In Pennsylvania the Company sells to some coal dealers who carry cements. The Company's policy in regard to whom it will sell as dealers has not changed since witness
48101 has been with the company. Sales made to its dealers since witness has been with the company have averaged over 80 percent of the Company's total annual sales. The Company sells and solicits over 800 active dealer accounts.

Mr. Brick: Pursuant to paragraph 4 of the stipulation, appearing at page 342 of the record, the Respondent Georgia Cement & Products Company adopts, with respect to itself, that part of the testimony of witnesses from other Respondents which appears in the record by line and page, as follows:

From page 26136, line 11, to page 26137, line 14.
From page 26196, line 7, to page 26196, line 14.
From page 26206, line 19, to page 26206, line 21.
From page 26208, line 6, to page 26208, line 10.
From page 26211, line 14, to page 26211, line 21.
From page 26441, line 23, to page 26442, line 12.
From page 33985, line 2, to page 33986, line 19.
From page 37215, line 16, to page 37216, line 11.
From page 37217, line 1, to page 37217, line 11.
48102 From page 37243, line 3, to page 37243, line 15.
From page 37315, line 18, to page 37315, line 20.
From page 37316, line 2, to page 37316, line 7.
From page 37605, line 19, to page 37606, line 6.
From page 37606, line 17, to page 37608, line 4.
From page 38691, line 8, to page 38691, line 10.
From page 38703, line 6, to page 38703, line 15.
From page 38709, line 10, to page 38709, line 13.
From page 38710, line 10, to page 38710, line 13.
From page 38720, line 13, to page 38733, line 6.
From page 38742, line 18, to page 38744, line 4.
From page 39509, line 7, to page 39510, line 13.
From page 39706, line 22, to page 39707, line 2.
From page 40096, line 24, to page 40097, line 1.
From page 40099, line 19, to page 40098, line 21.

From page 42402, line 2, to page 42408, line 3.
From page 42335, line 24, to page 42336, line 14.

Under the same stipulation and conditions, the Oregon Portland Cement Company adopts testimony which is designated by lines and pages, as follows:

From page 26136, line 11, to page 26137, line 14.
From page 26196, line 7, to page 26196, line 14.
From page 26206, line 19, to page 26206, line 24.
From page 26208, line 6, to page 26208, line 10.
48103 From page 26211, line 14, to page 26211, line 21.
From page 26441, line 23, to page 26442, line 12.
From page 33985, line 2, to page 33986, line 19.
From page 37215, line 16, to page 37216, line 11.
From page 37217, line 1, to page 37217, line 11.
From page 37243, line 3, to page 37243, line 15.
From page 37316, line 2, to page 37316, line 7.
From page 37605, line 19, to page 37606, line 6.
From page 37606, line 17, to page 37608, line 8.
From page 38691, line 8, to page 38691, line 19.
From page 38703, line 6, to page 38703, line 15.
From page 38720, line 13, to page 38720, line 18.
From page 38733, line 3, to page 38733, line 6.
From page 38742, line 18, to page 38744, line 4.
From page 39509, line 7, to page 39510, line 13.
From page 39706, line 22, to page 39707, line 2.
From page 40096, line 24, to page 40097, line 1.
From page 40098, line 19, to page 40098, line 21.
From page 42402, line 2, to page 42404, line 2.
From page 42405, line 23, to page 42408, line 3.
From page 42335, line 24 to page 42336, line 14.

Likewise, the Giant Portland Cement Company adopts the testimony in the record by pages and lines, as follows:

From page 26136, line 11, to page 26137, line 14.
48104 From page 26174, line 3, to page 26174, line 20.
From page 26196, line 7, to page 26196, line 14.
From page 26206, line 19, to page 26206, line 24.
From page 26208, line 6, to page 26208, line 10.
From page 26211, line 14, to page 26211, line 21.
From page 26441, line 23, to page 26442, line 12.
From page 33985, line 2, to page 33986, line 19.
From page 37215, line 16, to page 37216, line 11.
From page 37217, line 1, to page 37217, line 11.
From page 37243, line 3, to page 37243, line 15.
From page 37315, line 18, to page 37315, line 20.

From page 37316, line 2, to page 37316, line 7.
From page 37605, line 19, to page 37606, line 6.
From page 37606, line 17, to page 37608, line 8.
From page 38691, line 8, to page 38691, line 10.
From page 38703, line 6, to page 38703, line 15.
From page 38709, line 10, to page 38709, line 13.
From page 38710, line 10, to page 38710, line 13.
From page 38720, line 13, to page 38720, line 18.
From page 38733, line 3, to page 38733, line 6.
From page 38742, line 18, to page 38744, line 4.
From page 39509, line 7, to page 39510, line 13.
From page 39706, line 22, to page 39707, line 2.
From page 40096, line 24, to page 40097, line 1.
From page 40098, line 19, to page 40098, line 21.

48105 The Portland Cement Company of Utah adopts testimony from the record, by pages and lines, as follows:

From page 26136, line 11, to page 26137, line 14.
From page 26441, line 23, to page 26442, line 12.
From page 29604, line 12, to page 29604, line 17.
From page 33985, line 2, to page 33986, line 19.
From page 37215, line 16, to page 37216, line 11.
From page 37217, line 1, to page 37217, line 11.
From page 37243, line 3, to page 37243, line 15.
From page 37316, line 2, to page 37316, line 7.
From page 37605, line 19, to page 37606, line 6.
From page 37606, line 17, to page 37608, line 8.
From page 38691, line 8, to page 38691, line 10.
From page 38703, line 6, to page 38703, line 15.
From page 38720, line 13, to page 38720, line 18.
From page 38733, line 3, to page 38733, line 6.
From page 38742, line 18, to page 38744, line 4.
From page 39509, line 7, to page 39510, line 13.
From page 39706, line 22, to page 39707, line 2.
From page 40096, line 24, to page 40097, line 1.
From page 40098, line 19, to page 40098, line 21.
From page 42402, line 2, to page 42404, line 2.
From page 42405, line 23, to page 42408, line 3.
From page 42335, line 24, to page 42336, line 14.

48106 The Standard Portland Cement Company adopts the testimony in the record, by lines and pages, as follows:

From page 26136, line 11, to page 26137, line 14.
From page 26174, line 3, to page 26174, line 20.

From page 26441, line 23, to page 26442, line 12.
From page 29604, line 12, to page 29604, line 17.
From page 33985, line 2, to page 33986, line 19.
From page 37215, line 16, to page 37216, line 11.
From page 37217, line 1, to page 37217, line 11.
From page 37243, line 3, to page 37243, line 15.
From page 37315, line 18, to page 37315, line 20.
From page 37316, line 2, to page 37316, line 7.
From page 37605, line 19, to page 37606, line 6.
From page 37606, line 17, to page 37608, line 8.
From page 38691, line 8, to page 38691, line 10.
From page 38703, line 6, to page 38703, line 15.
From page 38709, line 10, to page 38709, line 13.
From page 38710, line 10, to page 38710, line 13.
From page 38720, line 13, to page 38720, line 18.
From page 38733, line 3, to page 38733, line 6.
From page 38742, line 18, to page 38744, line 4.
From page 39509, line 7, to page 39510, line 13.
From page 39706, line 22, to page 39707, line 2.
From page 40096, line 24, to page 40097, line 1.
From page 40098, line 19, to page 40098, line 21.

The Vulcanite Portland Cement Company adopts 48107 testimony in the record, by lines and pages, as follows:

From page 26136, line 11, to page 26137, line 14.
From page 26174, line 3, to page 26174, line 20.
From page 26196, line 7, to page 26196, line 14.
From page 26206, line 19, to page 26206, line 24.
From page 26208, line 6, to page 26208, line 10.
From page 26211, line 14, to page 26211, line 21.
From page 26441, line 23, to page 26442, line 12.
From page 33985, line 2, to page 33986, line 19.
From page 37215, line 16, to page 37216, line 11.
From page 37217, line 1, to page 37217, line 11.
From page 37243, line 3, to page 37243, line 15.
From page 37315, line 18, to page 37315, line 20.
From page 37316, line 2, to page 37316, line 7.
From page 37605, line 19, to page 37606, line 6.
From page 37606, line 17, to page 37608, line 8.
From page 38691, line 8, to page 38691, line 10.
From page 38703, line 6, to page 38703, line 15.
From page 38709, line 10, to page 38709, line 13.
From page 38710, line 10, to page 38710, line 13.
From page 38720, line 13, to page 38720, line 18.

From page 38733, line 3, to page 38733, line 6.
From page 38742, line 18, to page 38744, line 4.
From page 38509, line 7, to page 39510, line 13.
From page 39706, line 22, to page 39707, line 2.
48108 From page 40096, line 24, to page 40097, line 1.
From page 40098, line 19, to page 40098, line 21.

The testimony being adopted on behalf of each of these companies is pursuant to the same stipulation and the same circumstances and conditions to which I made reference in connection with the adoption of testimony by the Georgia Cement & Products Company.

48110 It is agreed that if the Executive Officers of Monolith Portland Cement Company and of Monolith Portland Midwest Company were called to the stand in this case, and were permitted so to testify, that they and each of them would testify that they had participated with competitors in a few openly filed joint bids, but that they and each of them deny that at any time had they entered into any conspiracy of any kind, character or nature with any competitor or with any one else, with reference to the sale of cement.

It is also agreed that all objections which could be urged by the attorney for the Federal Trade Commission
48111 if the above witnesses were called to the stand, personally sworn, and were testifying, are reserved by him and may be urged to all or any part of the above stipulated testimony at the time of the offer of this stipulation.

Re: Northwestern Portland Cement Company, Inc.

In view of the expense which would be entailed either in bringing witnesses from Seattle to Washington, D. C., to testify on behalf of Northwestern Portland Cement Company, Inc., or in conducting a hearing of the Federal Trade Commission in Seattle for the purpose of taking such testimony, and for the purpose of expediting and shortening this proceeding,

It is hereby stipulated that if C. T. W. Hollister, the president and general manager, and Ray A. Young, the sales manager of Northwestern Portland Cement Company, Inc., were placed upon the witness stand and duly sworn, and testified in the above-entitled proceeding as witnesses for said respondent, they would give as their testimony the statements hereinafter set forth.

Further, the statements hereinafter set forth shall be read into the record and shall be deemed the testimony of Mr. Hollister and Mr. Young as though they had been duly sworn and had testified from the witness stand at a regular hearing of this proceeding, and these statements shall be given the same force and effect as though
48112 they had actually testified thereto at a regular opening hearing, and shall be deemed evidence introduced on behalf of Respondent Northwestern Portland Cement Company, Inc. The fact that such testimony has been given by way of this stipulation instead of by actually placing the witnesses upon the stand shall not in any wise affect the weight or admissibility of the evidence. Counsel for the Federal Trade Commission shall, however, have the right to urge any and all objections to the relevancy and materiality of such evidences or any part thereof, and Counsel for the Commission shall have the right to move to strike any portion of this stipulation on these grounds, and such motion shall be deemed to have been timely made as objections to the admissibility of any such statements on the part of the witnesses as evidence herein on the aforesaid grounds of relevancy and materiality. Counsel for the Federal Trade Commission waive the right to cross-examine said witnesses.

Nothing contained in this stipulation shall be deemed to constitute any admission whatever on the part of either the Federal Trade Commission or its counsel that any of the statements contained in the stipulated testimony are true.

The testimony contained in this stipulation completes the evidence to be offered on behalf of Northwestern Portland Cement Company and no further evidence will be offered on its case in chief unless Northwestern is affected by later introduction of evidence relating to entirely
48113 new matter not now a part of the record in this proceeding; in which event, Northwestern shall have the right, if it so desires, to submit such new matter.

The testimony of C. T. W. Hollister and Ray A. Young, given on behalf of Northwestern Portland Cement Company, Inc., hereinafter referred to as "Northwestern," Respondent herein, is as follows:

1. C. T. W. Hollister was the secretary and sales manager of Northwestern from its inception in December, 1926, to January, 1932. He has been its president and general manager since January, 1932.

Ray A. Young has been connected with Northwestern since 1927 and has been its sales manager since January, 1932.

2. Northwestern was incorporated under the laws of the State of Washington on December 13, 1926. There are issued and outstanding at the present time the following shares of capital stock:

13,500 shares of First Preferred Stock—par value $100.00 per share;

13,500 shares of Second Preferred Stock—par value $38.00 per share;

23,500 shares of common stock of no par value; no bonds or other securities are issued or outstanding.

3. The capital stock is owned by approximately 48114 600 individual stockholders.

4. The directors of Northwestern are as follows: W. J. Kerr, J. D. Burns, C. T. W. Hollister, Frank Kiernan, Jr., H. K. Metcalf, Max Oberdorfer, and J. A. Reuter. None of the directors of Northwestern are officers, directors, or employees of any other cement company, nor does any director or employee of any other cement company hold any position in or with Northwestern. A majority of the directors have been directors of Northwestern since its inception.

5. The officers of Northwestern are as follows: C. T. W. Hollister, president; J. A. Reuter, first vice-president; Frank Kiernan, Jr., vice-president; Carl W. Gath, secretary-treasurer, and H. K. Metcalf, assistant secretary. Messrs. Reuter, Kiernan and Metcalf are inactive, non-salaried officers. None of the officers of Northwestern are officers or employees of any other cement company, nor does any officer or employee of any other cement company hold any position in or with Northwestern. Northwestern owns no stock in any other cement company and no other cement company owns any of Northwestern's stock.

6. Northwestern's office is located in Seattle. The plant is located at Grotto, Wash., on the main line of the Great Northern Railroad. Although the capacity of the plant is approximately 1,500 barrels per day, or 600,000 barrels per year, the demand for cement has not been sufficient to operate the plant at this capacity. Deposits of lime-
48115 rock and clay, the pricipal raw materials used in the manufacture of Portland cement are adjacent to the plant itself and owned by Northwestern. The loca-

tion of the plant was chosen because of the proximity of these raw materials as well as the favorable competitive position with relation to nearby markets.

7. The plant has operated since May, 1928, and cement has been distributed therefrom throughout central and western Washington. However, Northwestern has neither sold nor shipped any cement outside the State of Washington since some time in the year 1929. Northwestern endeavors to sell its product competitively at any point or for any project which will assure it a profit. Northwestern is a comparatively small company with limited storage facilities, and these limitations must be considered by it in its sales policy. It is unable to make indiscriminate commitments for large quantities of cement involving variable deliveries over an uncertain period of time.

8. The following customers are sold by Northwestern: Federal Government and its agencies, State Governments and the agencies thereof, counties, municipalities, school districts, highway contractors, general contractors, public utility corporations, railroads, concrete products manufacturers, concrete mixing plants, mining companies, and dealers. No classification is made of these customers and in quoting Northwestern has at all times reserved
48116 the right to sell direct or through a dealer on any work, and each case is decided according to its independent judgment to the best interests of the company, and without any agreement or understanding with its competitors.

9. In accordance with the national drive to enlist all industries in the N. R. A., it was Northwestern's understanding that The Cement Institute was set up by the manufacturers to simplify the adherence of the member companies to the N. R. A. Code, interpreting the Code Authority's rules and decisions in order that the purposes of the Code might be carried out. Therefore, with this understanding, and with the intention of doing our part, Northwestern became a member of The Cement Institute in July, 1933. No special services such as freight rate books, contract checking services, or credit reporting services which may have been offered by the Institute were at any time used by this Respondent. Northwestern's attitude toward The Cement Institute was at all times that it received its communications as advisory information only, keeping Northwestern aware of the general policies of the

cement industry with relation to the N. R. A. Code. At no time did Northwestern, either individually or with others, cooperate with The Cement Institute in any special effort or activity. No officer or employee of Northwestern has at any time held any official position or office in the Cement Institute. During the time Northwestern has been a member of The Cement Institute communications in the form of circular letters have been received from
48117 time to time covering clinker production, cement shipments, percent of cement shipments, clinker and cement stocks. These communications were not used in any way by it, inasmuch as comprehensive figures are received from the Federal Bureau of Mines. No statistics are furnished the Cement Institute by Northwestern concerning its operations, sales, or general policies. However, it does report to the Bureau of Mines such statistics as are requested by the Bureau. At no time has Northwestern made any reports to The Cement Institute or any other organization covering any sales contracts or any information revealing the course of its business or sales policies, with the exception that during the Code period it followed the N. R. A. Code.

At no time has Northwestern agreed to adopt the so-called compendium or the practices set forth therein. Some of such practices coincided with its already established policy. Others, appearing sound in effect, may have been adopted. Many of the provisions were totally ignored; for example: The provision requiring the signing of specific orders for definite amounts to be delivered within a definite time. Northwestern has never followed this practice. It has in a few instances placed a time limit for the acceptance of a quotation, but in no case has this ever been enforced. Written contracts for the sale of cement have been entered into in only two or three cases. In general, there have been many deviations from the practices set forth in
48118 the compendium by this Respondent. Not having agreed to adopt it, its sales policy has been maintained in accordance with its own independent ideas and judgment, keeping in mind the best interests of the company.

Northwestern has never been a member of the Cement Manufacturers Protective Association or of the Pacific Coast Cement Institute.

10. Northwestern has never used any contract form and

has never agreed with any other cement company or any representative thereof, or with The Cement Institute, or any other organization, as to any contract form. Seldom is any written memorandum, letter or other writing in the nature of a contract used. On a few rare occasions prior to November, 1933, quotation forms were used. A sample of the form last used, in October, 1933, which was just prior to the discontinuance of their use, is attached hereto, marked "Respondents' Exhibit No. 3789."

(RESP. EX. 3789 was offered and received in evidence.)

When quotation forms were used, that is, prior to November, 1933, they were used in Northwestern's own discretion and not upon the suggestion or by the direction of any competitor or organization.

11. No agreement or understanding has at any time been entered into with any competitor, cement company, cement institute, or any other organization, regarding the prices, sales policies, or terms of sale of the Respondent.

48119

12. Northwestern has never received from nor distributed to any of its competitors information regarding freight rates and has never followed any practices in concert with any other Respondent relative to the use of uniform freight rates as a basis of establishing prices. Northwestern has changed its discount terms from time to time to meet competition.

13. At no time has Northwestern entered into any agreement or understanding with any competitor or any other Respondent relative to the diversion of shipments from one destination to another and it has not used a non-diversion stamp. No agreements or cooperative measures have been entered into with any competitor or any other respondent for the purpose of eliminating diversion. Diversions of cars in transit have been made from time to time by customers. Northwestern has considered diversions undesirable where it would result in a diversion into another dealer's or customer's territory with the resultant loss of his good will by the company. Northwestern has never opposed diversions because they might result in a different delivered price or lower net return to it.

14. Except during the effective period of the N. R. A. Code and as directed in Article XI thereof, the Northwestern has not classified its customers. As a general sales

practice the company does not engage in retail distribution
or sale of cement. This is left almost exclusively to
48120 the dealers, inasmuch as the company is not
equipped with storage facilities or office force to handle numerous small retail sales.

15. As a general rule, Northwestern does not bid on W. P. A. purchases for several reasons. Investigation has shown that most W. P. A. work requires dealer service such as irregular deliveries. In many cases quotations are requested requiring delivery from the car to the job. In others, less than carload quantities are required. Furthermore, as is usually the case with W. P. A., the work is of a nature that dealers have serviced in the past and Northwestern is therefore inclined to leave quotations on this work to the dealers.

16. Northwestern has not entered into any agreement or understanding with any of its competitors relative to discounts, prepaid freight, changes in prices or terms of sale. Inquiries in the field keep it informed of the general prices and practices of its competitors and have brought to light many cases of differentials both in favor and adverse to it, such as prices, discount periods, prepayment of freight and cloth sack allowances. Such information is used to formulate its own sales policy in which it considers its own best interests, which are the interests of its hundreds of stockholders, employees, and customers whose good will is vital. No agreement or understanding has been entered into with any competitors regarding sales policies.

17. Relative to competition with imported cement,
48121 Northwestern meets this competition with intensified
sales effort and has not boycotted or threatened to boycott any dealers who handled imported cement. Its appeal to its customers is on the basis of quality, and fairness to American labor and industry. Northwestern sold dealers cement who also handle foreign cement.

19. To summarize,—Northwestern's policies are wholly founded upon its feeling of obligation and responsibility to its customers, employees, stockholders, and the consuming public. The company is a comparatively small producer with limited storage facilities, which it must consider in competing with others.

Northwestern has not entered into any agreement or understanding with any other Respondent or cement company

to establish prices, terms or conditions of sale or in any other matter pertaining to the operation of its business. It is an independent company, meeting competition as it finds it and in whatever manner it in its sole judgment decides is to the best interests of those to whom it is responsible.

RESPONDENTS' EXHIBIT NO. 3789.

Northwestern Portland Cement Company
Northern Life Tower
Seattle, Washington

October 19, 1935

f.o.b. .....

Gentlemen:

We are pleased to quote you, effective this date, 48122 "Northwest" Portland Cement, delivered in carload lots, minimum 132 barrels, f.o.b. cars station named above, based on present freight rates, as follows:

In paper sacks (four sacks to the barrel).....$..... per barrel.

In cloth sacks (four sacks to the barrel).....$..... per barrel.

Straight or mixed cars of cloth and paper sacks will be furnished as ordered.

All cloth sacks remain the property of the Cement Company and must be returned. The above price includes a loan deposit of ten cents (10¢) each for cloth sacks which will be refunded for all "Northwest" cloth sacks returned in serviceable condition to our factory, Grotto, Washington. We will pay the railroad freight on empty cloth sacks. Paper sacks are not returnable.

Terms, net thirty days, or ten cents (10¢) per barrel discount for payment in full, including sacks, within ten (10) days from date of invoice. Freight charges on cement shall be paid by consignee at stations where there is a railroad agent. When cement is stored at plant for commercial tests, five cents (5¢) per barrel will be charged for bin rental. Fees for commercial testing other than our factory tests shall be borne by the purchaser.

We reserve the right to quote and sell direct to the United States Government, State of Washington, counties,

Cities, Improvement Districts, Railroads, Public
48123 Utilities, Cement Products Manufacturers, and Public Works Contractors. Upon request of consumers, other than those named herein, we will quote in carloads, fifteen cents (15¢) per barrel higher than the above prices.

The above prices are subject to change without notice, and subject to the imposition of any sales tax or addition to manufacturing costs by Federal, State, County, or Municipal legislation.

We will not be responsible for delays in manufacture or shipping due to strikes, differences with employees, scarcity of labor, accident, fire, flood, warfare, inability to secure cars, fuel, or materials, or other causes not under our control, nor for any delay in transportation facilities.

Yours truly,

Northwestern Portland Cement Company,

Sales Manager.

48124 Washington, D. C.,
Wednesday, November 13, 1940.

48132 COMMISSION'S CASE IN REBUTTAL.

Mr. Wooden: Our first witness on rebuttal is Dr. Nourse.

Will you take the stand.

48133 DR. E. G. NOURSE, being called as a witness for the Commission, and having been first duly sworn, testified as follows:

Direct Examination by Mr. Wooden.

I am an economist, Director of the Institute of Economics of the Brookings Institution in Washington. My official position is Director of the Institute of Economics. It is one of the divisions of the Institution. I am not an officer in any technical sense nor am I a vice-president. I have been with the Brookings Institution ever since the formation of the Institution, which was a sort of merger including the Institution of Economics. I joined the staff of the Institute of Economics when it was formed in 1922. I have been director of the Institute of Economics since 1929.

48134 The nature and scope of my work has been entirely as a research economist working on projects of my own and directing the projects of others. A number of the earlier ones were in the agricultural field, such as American Agricultural Representative Markets, one of the earlier publications; more recent ones in the industrial field. To begin with, America's Capacity to Produce, America's Capacity to Consume, Formation of Capital, Income and Economic Progress, Industrial Price Policies, and Economic Progress.

Brookings Institution is an entirely independent partially endowed research institution which selects its own program of studies. Regarding those that are considered to be of timely public importance, we conduct our investigations and make any presentation of the findings which seem to us to be in the public interest.

Prior to my connection the Brookings Institution I had been in academic work during all my mature lifetime. I took my undergraduate degree at Cornell University, my Doctor's degree at the University of Chicago.

48135 I taught at the Wharton School, University of Pennsylvania, and various other institutions in the Midwest; Iowa State College was the last one, a post I held as head of the Department of Agricultural Economics for five years before joining the staff of the Institute of Economics. I have taught at some universities in the general field of economics. I was assistant at the University of Chicago and on the staff of the Wharton School, University of Pennsylvania.

Mr. Wooden: I tender the witness as an expert qualified in the general field of economics, Your Honor.

Mr. Leisure: If Your Honor please, I assume that the purpose of tendering a witness as an economic expert is to offer further testimony along economic lines. If that is the purpose, I want to object to any further testimony being offered along that line. The Commission in its case in chief produced five economists. When we had called four economists Your Honor felt that that was sufficient and did not allow us to call any further. Now, it seems to me that the chapter is closed on that part of the case. I do not see how—

Trial Examiner Nor[illegible]wood: I think you had called five economists.

48136 Mr. Leisure: I had not finished my statement.

Trial Examiner Norwood: Didn't you have five?

Mr. Wooden: They had five and we had four.

Trial Examiner Norwood: That is what I thought it was at the time I made the ruling.

Mr. Wooden: But this is rebuttal, Your Honor.

Trial Examiner Norwood: I thought I was giving you a margin of one.

Mr. Leisure: Well, I think counting every one of the Government's side of the case you qualified as economists, that they were perhaps even, but—

Trial Examiner Norwood: Well, I certainly think we should not go into matters that were covered on the direct examination, but I cannot anticipate. I do not know what he is covering. There were many things brought out on the rebuttal case, brought out on the Respondents' case, that on rebuttal he might be entitled to answer. I am not sure about that.

But do you object to his being accepted as an expert, that is the only question we have now.

Mr. Leisure: I simply wanted to get my objection on the record at the appropriate time to their producing any further economic testimony. I think this is a part of their principal case in the field of economics, and since we were limited I think they also should be limited as to

48137 his being accepted as a general expert in the general field of economics.

As to the qualifications, he seemed to be certainly qualified.

Trial Examiner Norwood: I recall in a general way some new matters that were brought out by your experts. I have not the slightest idea what the Counsel is going to offer, but it must be something that is rather necessary.

I will accept him as an expert witness.

Mr. Wooden: I will say, Your Honor, it will be strictly rebuttal, and it will be quite short, and that it will be the only economist, if that is any news of value to the Respondents.

Mr. Zimmerman: If the Examiner please, I shan't intervene at this time with any suggestion of examination on voir dire. I make that suggestion because I think that there has been rather a slim showing as to Dr. Nourse's study along the lines involved in this particular case, but it may be—I suppose that we may go into that on such

cross-examination, if any, as we may want to take up later. I suggest that only because I do feel that there should be some reservation made at this time as to his qualifications along this particular line. I do not know what they are, and I cannot assume.

48138 Trial Examiner Norwood: If it appears at any time that he is not an expert, why, I shall take proper steps.

Go ahead.

The Witness: Is it appropriate for me to make a statement on that point?

Trial Examiner Norwood: Yes.

The Witness: That I had no thought of being qualified as an expert in the matter of cement organization or prices. It was my understanding that the only question of expertness involved was that in general economic theory.

Mr. Wooden: That is true.

Trial Examiner Norwood: Proceed.

By Mr. Wooden:

Q. Are you familiar, Dr. Nourse, with the writings of economists on the subject of the behavior of prices on a standardized commodity in a competitive market under conditions of competition?

A. I would say in answer to that that my particular field of specialization throughout my professional career has been that of marketing and prices. It has been divided between two parts of that field; one, the agricultural field; the other, the industrial field, and, of course, in the agricultural field we do confront that situation of standardized product almost predominantly.

Q. What is the economic theory as to the behavior
48139 of prices on a standardized article in a competitive market under competitive conditions?

48140 A. Well, I should say the general situation contemplated there is that various suppliers come to a market reflecting different productive situations, different computations or estimates of cost, different situations which give them an array of what economists call supply schedules. They are confronted there with buyers of various sorts, who also have a range of purchasing powers, demand for an article, and so forth, which presents over against that a varied array of demand schedules, that in the higgling of the market, as it is ordinarily called, there will be some sort of an agreement which will effectuate a

certain part of exchanges at a price, that any price is the general mechanics of a competitive market as we see it.

By Mr. Wooden:

Q. Does the price which eventuates out of the conditions which you have just described tend to be a uniform price at any given time?

A. Yes, for a single market at a single time this approximates uniform price.

Q. And how—could you say that that is the consensus of economic theory on that subject?

A. Oh, yes, that is the established doctrine, I should say.

Q. Now, does that theory, as you have outlined it—to what extent does it apply to the making of price
48141 quotations as distinguished from actual sale prices?

A. Oh, I should say the theory is originally formulated and applying to the rather simple conditions does not contemplate essentially the situation of quotations. It is based on a rather simple commercial situation in which suppliers of goods come to a market and more or
48142 less verbally offer their goods there. It does not involve any elaborate or later developed scheme of quoting prices.

Now, as it passes over, I would say the general postulates of theory carrying over would be that these supply schedules still reflecting the several costs of several producers if reduced to quotation would be a schedule of prices that would reflect their varied situations, and as applied to quotations in various markets the conditions of delivery in those several markets that is, that is the logic of building up a pricing system from those premises, as I understand it.

48143 Q. Well, I will ask you, Dr. Nourse, to state whether or not the prices, the economic theory to which you have been addressing yourself, contemplates that quotations as distinguished from prices will tend to be uniform as between competing sellers on a standardized commodity in a competitive market?

48144 Trial Examiner Norwood: Well, I think the question comes to that. I think this witness would not be misled by—influenced by a leading question, anyway. I really do not think it is harmfully leading, and I think it is, in a difficult subject like this, that it might be permitted, should be permitted.

Go ahead.

Do you want the question read, Doctor?

The Witness: No, I think it is not necessary, and I think the statement made by the gentleman here is eminently correct, that I was answering in terms of the price, making prices as analyzed by professional economists, it is sort of a theory which has been built up on particular suppositions, is a relatively simplified theory,
48145 and does not contemplate the sophisticated schemes of price quotations which have been developed in many parts of the industral system, and I do not see any real inconsistency myself. I am entirely ready to accept that interpretation of what I am saying.

By Mr. Wooden:

Q. What economic theory, if any that you know of, Dr. Nourse, would tend to explain identity of price quotations by competing sellers in a competitive market as distinguished from identity of actual selling prices?

A. Well, I do not know that I could state in terms of an economic theory because a theory is a generalization; the theory of competitive price which I have been discussing here is that of generalized conditions in which each producer would conceivably be attempting to maximize profits on the basis of his individual situation, each acting in a highly individualistic manner.

Now, as to the types of quotations that they would develop, that, again, I think, in the logic of the theory, would follow their own interpretation of their own individual advantage.

Q. Well, is there any economic theory, so far as
48146 you know, that would tend to explain the identity of price quotations as distinguished from an identity of actual selling prices and competitive conditions?

A. Well, if the question is, as I understand it, as to whether economic theory has gone this generalized situation which I have been discussing to develop some similar theory or an extension of that theory to cover price quotations, I am not aware of anything of that sort in the literature that it goes beyond the realm of automatic mechanics of a market, which is the essence of the doctrine of competitive price.

Q. Will you state, Doctor, what the economic principle of indifference is, if you recognize that term?

A. Well, that is a term which has come into considerable vogue in theoretical discussion in recent years. It is not

any idea. I take it, it simply is a new expression of the old base idea of this simple condition that persons going into a market would try and get the best price that they could. It is a purely colorless process, mechanical
48147 process, as far as they were concerned. They would not take a lower price from one person normally in that bargain than they would from another, and that was the explanation, the economic man operating on those principles, which would bring the price in a market at a given time to a uniform level.

Q. I should say the question assumes the same time, and that it is a practice continually, not merely an isolated occasion.

48148 Mr. Leisure: Were the sales at the same place; that is just as important as the time.

Mr. Wooden: I put the question as I want to put it.

Trial Examiner Norwood: Read the question.

(Question read.)

Trial Examiner Norwood: The objection is overruled. Answer the question.

A. Well, I take it that the inclusion there, the qualifying phrase about the cost of selling, would include differences in the place of delivery. The theory in general, of course, which is a rather simplified sort of theory, is that producers coming into a market conceived rather in terms of the market place with sellers physically present, which was the one which was rather general at the time economic theory was first formulated.

Now, as you extend that forward and have an industrial plant selling in several markets, and with different costs of putting it into that market, I should say that the thought would be, as the extension of the logic, of the general theory of uniform price and market, would mean that he would not expect under one set of circumstances to sell the product at a lower price than he would under another; that is, he would not take from part of his market a lower price than he was taking from part of the other, just as if all sellers were lined up in front of him, and he would not
48149 pick out one and say, "I will take a lower price from you," or "I must have a higher price from you."

Trial Examiner Norwood: When you refer to price there, what do you mean? What he realizes?

The Witness: Realizes.

Trial Examiner Norwood: Realized price?

The Witness: Yes.

48150 Trial Examiner Norwood: Now, you might explain to us what you mean by "realized price."

The Witness: I mean the price which goes into the net revenues of the company, of the seller.

Mr. Wooden: Of the seller, do you mean?

The Witness: Of the seller, yes; of the seller company.

By Mr. Wooden:

Q. Suppose you assume, Dr. Nourse, that the delivered cost to a buyer of a standardized commodity is identical when figured from each of a number of competing sellers that are variously located freightwise, with reference to the buyer's destination, is there any consensus of experts economic opinion to the effect that the purchaser under those conditions and under competitive conditions may normally expect that the delivered cost to him will be identical?

A. No, I should say that that, as I understand your description of the situation, is one which lies outside, beyond the theory as it has been developed and could be called established theory among economists; that is, it would take something more than the ordinary generalized theory to explain that situation.

48158 "Q. What effect, as an expert economist, Dr. Nourse, would you see in a situation in an industry characterized by a low rate of production compared with the capacity of that industry to produce coupled with a long continued rigidity of price, confining your answer to the effect upon employment and consumption and general business conditions?")

48159 A. I think the phrasing of the question there need to be called attention to. What effect would you as an economist see in a certain set of situations. It raises the question of the very character of the inquiry that an economist is making, and confronted with an industrial situation. He has one criterion which he applies. He is concerned with that sort of a functioning of the economic system which promotes the maximum well being of the total population. Very well. He looks at a particular industry and it does not—his answer is an entirely generalized answer. It does not apply to any particular

48160 industry. He looks at any industry and he sees a condition of large over-capacity or low utilization

of capacity to which resources of the community have been devoted. He finds that idle, and he regards that as an unsatisfactory economic result according to the criterion from which he startes any inquiry. So much for the first part of the question.

The second inquiry, I think, this somewhat resolves the difficulty of definition of rigidity of price. Confronted by that sort of a situation which, according to economic criteria, is unsatisfactory, he then examines the administration of that industry, of which its whole price policy, price structure and price level are parts, to see whether in that situation he can find any clue to this unsatisfactory functioning of it as part of the economy.

Now, those essentially, with a frame of references from which we started a very extended study, starting with America's capacity to produce and going through to the examination of price systems, among the characteristics of any price system which he would examine are those things which might be expected, of course, would be any departures from the sort of competitive pricing which I described earlier as being characteristic of the competitive market under simple conditions in industry, of course, a large number of very unsimple conditions have developed, and I think that no generalized answer could be made as to rigidity of prices, however defunct, except on 48161 the basis of an intimate factual knowledge of that industry, and examination of what causal relation might obtain there.

In other words, definitely you would depart then from the realm of a naturalistic or automatic price-making process to one which is on the very face of it an artificial, and to scrutinize the character of those artificialities, or reasons for that, and the result, and whether that is due to the low utilization of capacity, the small return on capital invested, and the unemployment of part of your labor force.

By Mr. Wooden:

Q. I was just going to ask you at that last point, what is the effect, economically, of the situation that I outlined in my question upon employment and consumption?

A. Well, I should say that the two are presumably linked, if you have an industry which has been built to a certain capacity and has a more or less attached labor force, then roughly speaking you would have an amount of unemployment which is about proportionate to the non-

utilization of plant capacity, and every amount of non-utilization of plant capacity, and of unemployment, of course, means to that amount less production, and less production means a less possibility of consumption.

48162 *Cross-Examination by Br. Bond.*

Q. Doctor, is it not a fact that the marketing of agricultural products is quite a different problem than the marketing of industrial goods—manufactured goods?

A. Yes.

Q. And they are customarily marketed in entirely different ways; are they not?

A. Well, the earlier methods of organized exchange markets, of course, correspond very closely to the theory of competitive marketing, as understood by economists in general. The more recent developments of the cooperative movement, in which I was engaged particularly, of course, relate more to specialized products. Products that are differentiated or unstandardized are marketed by large, sometimes nationwide, organizations, and in that field I think there is comparatively little difference.

Q. There you get outside of the field of standardized or homogeneous commodities, do you not?

A. Yes; that is true.

Q. But as far as the homogeneous products in agriculture, such as wheat and its different grades, corn,
48163 etcetera, are concerned, those are marketed on these central exchanges principally, are they not?

A. Surely.

Q. And that is quite a different method of marketing than you would expect to find in the case of homogeneous manufactured products?

A. Yes. Of course, you have only a limited number of homogeneous manufactured products.

Q. But the individual farmer offering his wheat for sale in one of these markets does not have the possibility of having a price policy in the way that the manufacturer can have his price policy.

A. Of course, the two situations are not comparable, because you have, in the case of a farmer, a worker who has an individual product. In the case of the cement worker, he does not sell his cement separately, or the steel worker does not have any steel that he makes and sells; so the situations are quite different.

Q. The situations are not at all comparable, are they?

A. No.

Q. Do you recall, Doctor, Mr. Wooden's question about a producer accepting different prices at one time,
48164 and he asked you on what economic theory you could explain that.

A. Yes.

48167 Q. That is right. We agree. If you assume, then, a high degree of inelasticity you would still say that is not of any importance in this matter of
48168 the producer selling in different markets at the same time and getting different nets?

A. Well, you mean inelasticity of demand in a local market?

Q. Yes; in the most favorable market, the market which would give him the greatest return, and he therefore makes other sales in other markets at a lower price. Would you not agree that that was an important factor in explaining that phenomenon?

A. Yes. I take it that an individual producer of some size could protect a local market by calling upon some other market on some other basis of price.

Q. And if he had found out from previous experience that a lowering of the price there would not increase his sales proportionately, then would you not consider it perfectly natural for him to endeavor to sell in other markets?

48169 A. Yes, sir.

Q. Then, you are familiar with the fact that in times of depression, of slack business, few sales can be made whatever price concessions might be offered?

A. Yes.

Trial Examiner Norwood: With overproduction and an inelastic demand, would those two things produce a
48170 condition of dumping outside of the regular territory, or not?

The Witness: Well, of course, dumping is a phenomenon of a market in which the unit of organization is large enough so that it can exercise a strategy.

48172 *Redirect Examination by Mr. Wooden.*

Q. Doctor, are you receiving, or are you to receive, any compensation for your testimony here today?

A. No; I did not receive any compensation, and that is

the statement that I wanted to make, if it is proper to add that as part of the answer.

Trial Examiner Norwood: Go ahead.

A. (Continuing.) With reference to the policy of the organization that I belong to, we definitely seek in every way to avoid involvement in any particular controversial question, and I think I made clear earlier that the scope of my testimony was limited to questions of theoretic economics.

48176 (COM. EXS. 1073-F and 1073-G, were offered and received in evidence.)

48180 C. A. APPEL being duly called as a witness for the Commission and having been first duly sworn, testified as follows:

Direct Examination by Mr. Wooden.

I am a special agent of the Federal Bureau of Investigation and I have been with that department for sixteen years. I work in the laboratory of the Bureau in Washington, in the examination of questioned documents, papers and writings concerning handwriting and
48181 typewriting, the identification of those, or erasures, or any other problem which concerns the technical examination of papers. As a foundation for my present work I have attended lectures on the subject, read books and done the work. I have been there as long as the laboratory itself. I organized the laboratory.

As an expert witness on the matters in the field just described I have testified in federal, state and military courts all over the country, before committees of Congress, the Court of Claims, and in other hearings, and so forth. I have testified in the case of Lee Snyder and others at Norfolk, Virginia, in the O'Connell kidnaping case at Binghamton, New York, and in the case of Nichols and others in Salt Lake—just innumerable cases. I also appeared as an expert witness in the so-called Lindbergh kidnaping case in the Bronx, New York. I am a graduate attorney.

48182 Mr. Wooden: I tender the witness as an expert in these particular fields that he has just outlined.

Trial Examiner Norwood: He is accepted as such.

By Mr. Wooden:

Q. Mr. Appel, I show you Commission's Exhibit 137-J in this proceeding, being a typewriting page, which contains two lines which have been X'd out on the typewriter. Have you seen that paper before, and, if so, tell us under what circumstances?

48185 A. This paper was submitted to me for examination in the laboratory of the Bureau here at Washington.

By Mr. Wooden:

Q. What did you do with it, or about it, after you received it?

A. I examined the two lines which are X'd out, in order to ascertain what typewriting was there before the X'ing was placed there.

Q. What methods of procedure did you follow in doing what you said you did?

A. Well, I examined the paper at these places with magnification and special arrangements of lights, so as to observe the identations on the paper, the lines caused by the typewritten letters, so as to read them.

Q. After going through that process were you able to read the words which appeared underneath the X's?

48186 Yes, sir.

48187 Q. Mr. Appel, showing you paper marked "Commission's Exhibit 3306," for identification, will you tell us what that is?

A. This is a photographic enlargement of the two lines of typewriting which are X'd out on the Commission's exhibit that was just shown me.

Q. Was that made by you in connection with your study of the X'd out lines?

A. Yes, sir.

Q. What magnification is that of the original?

A. Well, it is about eight or ten times.

Q. Well, now, will you examine the original document—

Mr. Leisure: I have got it, Mr. Wooden.

By Mr. Wooden:

Q. —and tell us what the X'd-out lines read?

48191 Mr. Wooden: In answer to Your Honor's question. I may say that this page, Commission's Exhibit 137-J, is page 4 of a report of the manager of The Cement Institute presented to a meeting of the Institute

on April 8, 1930, and was attached to the minutes
48192 of that meeting which begin with Commission's Exhibit 137-C.

Trial Examiner Norwood: Where did it come from?

Mr. Werle: Do you mean attached in the record or attached in your book?

Trial Examiner Norwood: Wait a minute.

Mr. Wooden: They were identified by Witness. Milwe as having been obtained from the Institute files.

48195 By Mr. Wooden:

Q. Based upon the result of your examination and study in the manner you have described and upon your magnification, will you tell us what those X'd-out lines and words are?

Trial Examiner Norwood: Now, it is understood that the objections apply to this question as reframed, and the same rulings apply, and Counsel have their exceptions.

Mr. Zimmerman: Right.

Trial Examiner Norwood: Answer the question.

A. "Such cancellations may be taken as an im-
48196 mediate measure of the success of this part of the Institute's work."

48206 J. T. SCHUTZE, being called as a witness for the Commission and having been first duly sworn, testified as follows:

Direct Examination by Mr. MacIntyre.

I am chief clerk of the Trunk Line Association, 143 Liberty Street, New York. I have been so employed for two years. Prior to that I was connected with the
48207 Association doing clerical work for nineteen years.

Q. Now, as chief clerk of that Association, do you have custody of its files?

A. I do.

Q. And do those files contain documents which came to that Association in due course from its correspondents.

A. Yes.

Q. And the matter of seeing that those documents are properly filed and kept is under your supervision?

A. That is right.

Q. Mr. Schultze, I now show you documents marked for

identification as Commission's Exhibits 3307, 3308, 3309-A to E, inclusive, and 3310-A to D, inclusive, and I will ask you to state whether or not you recognize those documents as documents from the files of the Trunk Line Association over which you have supervision and custody?

A. They are.

Q. Were they taken from those files by you?

A. I took them off the file and handed them to you in the office.

48208 Q. Mr. Schultze, do you know anything at all about these documents or their contents?

A. No, sir; nothing.

Q. Other than what you have testified to?

A. That is right.

Q. Do you know anything about the transactions that are involved as shown by the contents of the documents?

A. No, sir; I never read them.

48215 *Redirect Examination by Mr. MacIntyre*

Q. Mr. Leisure asked you on cross-examination about Mr. H. Wilson. You told us that Mr. Wilson is now living in New York in his connection with the Trunk Line Association.

A. No; he lives in some town in New Jersey; but he is still connected with the Association.

Q. In what capacity?

A. He is vice-chairman.

Q. And you knew him at one time as chairman of the Association?

A. That is right.

Q. About when was that?

A. I can't say definitely.

Q. Well, about when?

A. Some years.

Q. Preceding Mr. Collyer?

A. I guess it was over that. Mr. Collyer died about eight years ago, and I believe Mr. Wilson was vice-chairman since before then, but I am not certain.

48216 Q. Well, he was chairman before Mr. Collyer was chairman.

A. He was not chairman of the Association. He was probably addressed that way.

Q. He was vice-chairman of the Association?

A. He was chairman of one of the committees.

Q. You spoke, in response to a question by Mr. Leisure, about Mr. Askew—W. R. Askew.

A. Yes.

Q. And you told us that he died about four years ago.

A. That is right.

Q. What position, if any, did he hold with the Association previous to his death?

A. He was chairman of the Freight Traffic Managers Committee at that time.

Q. And for what period of time?

A. I can't say definitely.

Q. Well, up to the time of his death?

A. Several years.

Q. Up to the time of his death?

A. That is right.

Q. Going back over a number of years?

A. It could be any number. I wouldn't know exactly.

Q. You knew Mr. R. N. Collyer as manager of the Trunk Line Association?

A. That is right.

48217 Q. Up to the time of his death?

A. Yes.

Q. Eight years ago.

A. That is right.

Q. And for a number of years.

A. Oh, Yes.

Mr. Wooden: I wish to offer at this time Commission's Exhibit, for identification, 3305-A to E inclusive.

Mr. Zimmerman: What is that number?

Mr. Wooden: Commission's Exhibit, for identification, 3305-A to E, inclusive, the same being a letter of transmittal addressed to Your Honor and authenticating the remaining portions of the exhibit, as being true photographic copies of authentic documents, and waiving

48218 any objection on behalf of the Trinity Portland Cement Company.

Mr. Zimmerman: That would not be anything that the Marquette Company would be interested in at all, I take it; so I will not say anything.

Trial Examiner Norwood: When were those marked?

Mr. Wooden: Yesterday, I think, or the day before.

Mr. Leisure: As to this Exhibit 3305-A, it is clearly a letter of transmittal, and I see no need for encumbering the record with that.

As to 3305-D and E, that is already in the record. We object to it, in the first instance, on the ground that it refers to "Incor," which is a special cement, and this has no place in this record, and it was just as objectionable when it was first offered as it is now. In addition, it duplicates the record at the present time.

Trial Examiner Norwood: That is a letter that some counsel sent to me, together with copies of some originals that have been received in evidence.

Mr. Leisure: But this one is already in the record. There is no need for it being received again, and there is no need for receiving the letter of transmittal. So that leaves only Exhibit 3305-B and C.

Trial Examiner Norwood: 3305-D and E are already in evidence?

48219 Mr. Leisure: Yes, sir.

Mr. Wooden: Of course, I have no desire to duplicate the record, and if I can be shown that they are duplications I have no desire to have them in, but it was my understanding—

Mr. Leisure: Well, can't we let it—

Trial Examiner Norwood: As I understand it, that is one of those that were received and misplaced, and this was to take the place of that.

Mr. Withrow: No.

Mr. Leisure: That statement ought to appear in the record, if that is the way it is.

Mr. Withrow: I think Your Honor is confusing this situation with another incident.

Trial Examiner Norwood: Possibly.

Mr. Leisure: Why can't we take care of it in this way, that Your Honor rule on it subject to its not being already in the record, and if it is it can be withdrawn.

Trial Examiner Norwood: Yes; I think we should do that.

48224 (COM. EX. 3305-B to 3305-E was offered and received in evidence.)

Mr. Wooden: At this time, Your Honor, I desire to offer in evidence certain exhibits marked for identification and which were previously identified, the same being Commission's Exhibits 82, 2210, 2211, 2212, 2213, 2214, and 2215. All these documents are letters received in
48225 the ordinary course by the Aetna Portland Cement Company from dealers expressing their approval of

the company's trucking policy. They were identified as such by Mr. Cree, and I offer them in evidence not for the truth of the contents but as showing the attitude of the company's dealers on which the company acted in formulating its trucking policy, and in rebuttal of numerous exhibits offered on their defense by Respondents' Counsel, consisting of letters from dealers objecting to the trucking of cement.

Mr. Withrow: May we see the papers.

Mr. Werle: Is the Commission's Exhibit 82 lettered?

Trial Examiner Norwood: Off the record, now.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Leisure: I do not know whether Your Honor is familiar with these exhibits or not. They purport to be letters from dealers to the Aetna Company. I am sure Your Honor will recall that during our case at least 90 percent of the letters of a similar character that we offered in evidence were excluded, and I specifically point out to Your Honor that during our case all of the letters having to do with this particular company from dealers were excluded. Now Mr. Wooden offered these once on his direct case.

Mr. Wooden: I never offered—I offered only 48226 Exhibit 82.

Mr. Leisure: Yes, Exhibit 82 on his direct case, and now he offers Exhibit 82 again together with these additional letters. Well, if the letters which we offered during the defense of our case were excluded, certainly that letter stands on no better foot at this time during rebuttal than it stood at the time he first offered it.

Trial Examiner Norwood: On the contrary, if any dealer letters were received for your case, then these should be received; is that right?

Mr. Brick: If that were the fact.

Trial Examiner Norwood: If we received a substantial number of those to show the reasons for your adopting certain policies there?

Mr. Leisure: No.

Trial Examiner Norwood: And I recall that we received a very great many, and I only begun to reject them after we had received an abundance of them to show the picture to the Commission.

Mr. Leisure: But does Your Honor give any considera-

tion to the point of my objection, that all of the dealers' letters to the Aetna Company having been excluded when we offered them it is now improper for him to offer dealers' letters for that same company and for Your Honor to reverse your ruling and allow those?

48228 (COM. EXS. 82, 2210, 2211, 2212, 2213, 2214 and 2215 were offered and received in evidence.)

48242 (COM. EX. 3247 was offered and received in evidence.)

48244 Washington, D. C.,
Thursday, November 14, 1940.

48260 RICHARD W. BARRETT, being called as a witness for Commission and, being first duly sworn, testified as follows:

Direct Examination by Mr. MacIntyre.

I am vice president and general counsel of the Lehigh Valley Railroad Company and I have held that position since January 1, 1927. For many years prior to that time I was general solicitor of the same railroad.

48260 Q. In connection with your duties as general solicitor for that railroad did you handle any litigation that involved matters that had been complained about by cement manufacturers?

A. Yes, a great deal of it.

Q. What form did those complaints take, will you please tell us?

A. Well, they were always, of course, rate com-
48261 plaints, complaints against the rates in Trunk Line —the complaints that I handled, when I say I handled; I want it understood I was simply chairman of the committee of the railroad counsel trying those cases.

Q. It had to do with complaints that had been filed by the cement manufacturers with the Interstate Commerce Commission?

A. That is correct.

Q. And will you tell us as far as you can the nature of the matters which were complained about?

A. Well, yes, sir; I will tell you from my recollection that the complaints were in reference to rates from the three cement districts that we recognized as districts in

Trunk Line territory. One district known as the Lehigh district around Allentown and Northampton, Pa., and then there grew up a Hudson district—it is just a local name of it around Hudson, N. Y., and then there were some cement mills up in the lower part of the Adirondack region, Howes Cave, and Glens Falls, and all of these cement plants, of course, wanted to get their cement into New England; New York harbor was the greatest place, the greatest terminal, I think, for cement in the whole country; at any rate, it was so testified, and the competition between those various districts to get into New England was for many years evidenced by complaints of discrimination. They always, of course, alleged that the rates, themselves, were undue and unreasonable in themselves, but it was
48262 discrimination that was generally tried out in those cases, and I am speaking generally because there were so many of those cases. I was in those rate cases; it began about 1920 or 1921, and on until I quit the business in 19—I finished up some of them in 1927, maybe 1928, I do not remember, and the differential, as we call it, between the rates from the Hudson district to New England and the rates from the Lehigh district to New England was always in evidence in those cases. There were some cement mills that were involved, the Universal, and it affected the Pittsburgh district. If those rates were put down too late then the Pittsburgh district would be in the cases. If they were lower than that, and the differential was increased, then we would hear from Security and Deposit in Maryland, and that is a general outline of the cement rate litigation that went on during those years.

Q. Can you tell us what was the nature of the complaint that was made by the cement shippers—that is, manufacturers—concerning the rates out of the Lehigh Valley district into New York and other such points beyond into New England?

A. Well, they attacked the rates because they were on too high a scale compared with what was known as the C.F.A. scale. In other words, they wanted a reduction in those rates to—I can't remember what the percentage was—but we had it so much, it was considerable reduction, they did not ask that they be brought down as low as
48263 the C.F.A. scale, but they did ask that they be brought a great deal lower than they were, and I made a memorandum as to what it would cost the com-

panies, and it was a very large sum, and, of course, we were very bitterly opposed to it.

Now, I think I have answered that sufficiently. If I have not, I wish you would ask me a more definite question.

Q. Did complaints from the cement manufacturers, shippers, with respect to the Lehigh Valley rates to points outside of the Valley have anything to do with an effort to base those rates on any particular shipping point?

A. Well, certainly, because of the C.F.A. scale of rates, they naturally wanted them based upon the shipping point, principal shipping point within the territory, which was around Northampton, Pa. In other words, make a certain scale of rates from Northampton on that district to New England, and those rates were to certain points in New England.

After you got beyond a certain distance they insisted that those rates be the same; in other words, as we call it, flatten out. I do not remember what the point was, it probably was 70 or 80 or 90 miles; when the rates were flattened out, and be the same.

Q. That is irrespective from what shipping point?

A. In the district, that is right.

48264 Q. Now, in connection with these complaints, about which you have told us, did you, in addition to appearing before the Interstate Commerce Commission, have any direct negotiations with the cement manufacturers concerned?

A. Oh, many.

Q. And will you tell us in so far as you can the names of the parties with whom you dealt in those negotiations?

A. I dealt with a committee of cement traffic men, and when I say "I dealt," I want it understood to mean that I, as chairman of this committee of counsel for the railroads, and it is my recollection that my file shows that Walter Young, traffic manager of the Atlas Portland Cement Company, was the chairman of that committee for a considerable time, I do not know how long; other members of the committee I remember was Mr. Guy, and Mr. McCarry, and Mr. Paulson. Well, those were the men that I knew very well personally.

Q. I am showing you Commission's Exhibit, for identification, 3350-A to E, and I will ask you to refer to that particularly at the lower part of the page marked 3350-D, if necessary to refresh your memory and recollection as to

any other members of that committee, and as to the names of the company represented by the gentlemen you
48265 have already named as members of the committee.
48267 A. Well, I would remember a number of the names by reference to this document, the members of the committee who were Walter Young, F. E. Paulson,—Paulson represented the Lehigh Portland Cement Company at Allentown; and F. E. Guy,—Mr. Guy represented the Universal Cement Company, Pittsburgh; and C. R. McCarry, and C. R. McCarry, Philadelphia, I would like to look as to what he did call his company,—Hercules Cement Corporation; and C. H. Reigart, I did not know him personally, I do not remember him. Reigart represented not a cement company at all, the Nazareth, Pa., Traffic Bureau. W. E. Gardner,—W. E. Gardner represented the—was traffic manager for the Security Cement & Lime Company, Hagerstown, Md. J. H. Gosnell. Mr. Gosnell was traffic manager of the Tidewater Portland Cement Company, Baltimore. And H. C. Carpenter. Carpenter was traffic manager of the Pennsylvania Cement Company, Bath, Pa. And C. N. Apgar. Mr. Apgar was traffic manager of the Alpha Portland Cement Company of Easton, Pa. F. H. Taylor. Mr. Taylor was traffic manager of the Virginia Portland Cement Company. And the Knickerbocker Portland Cement Company, New York City. And the last one was W. F. Nagle. He was traffic manager of the Coplay Cement Manufacturing Company, Coplay, Pa.

By Mr. MacIntyre:

Q. Now, will you tell us all that you can concerning the negotiations that were handled between you, repre-
48268 senting this committee of the railroads, and Mr. Young, chairman of this committee, and the other members of this committee representing the cement manufacturers?

48271 A. Well, these negotiations were in 1925, 1926, and 1927, if you call them negotiations. They were conferences, and I have no personal recollection of anything that was done except what my records show. It would be ridiculous for me to try to do that.

48272 Q. Now, I show you Commission's Exhibits, for identification, 3335-H and I, 3310-A to D, and ask you if after looking at those, and also Commission's Exhibit 3352-A to C, will you tell us what they are, and in what manner that they are concerned with the matters

about which I have just asked you—that is, the negotiations?

A. Well, I note—is this the number of this?

Q. That is the number.

A. That this 3310-A is a record that I made of a meeting held at the Trunk Line Association in New York on May 19, 1926, and it shows who was there for the railroads, traffic men, and their lawyers, and who was there for the cement people, and what we did.

48273 Q. Now, referring to Commission's Exhibit, for identification, 3355-H and I, as being a part of a certified record from the Interstate Commerce Commission of a part of a transcript of record, would you say that the statements attributed to you appearing on those two pages in that transcript are in reference to a conference which is recorded on Commission's Exhibit, for identification, 3310-A to E?

A. Well, that is the one I just referred to, as being dated May 19, 1926.

Q. Yes.

A. Well, what I stated in my report or in my memorandum of the conference held on May 19, 1926, was, of course, the subject matter of the cement cases.

Q. On that day?

A. On that date, and this Commission record is a short record which I likewise had in my files, I do not know whether it is there now or not, or what I said to the Commission when it met at Harrisburg,—or, what is the date? October 7, 1925. This is away later than that, we were still going on with these matters.

Q. Let me ask a question.

A. This—excuse me—this, referring to my memorandum, May 19, 1926.

Q. Now, referring again to Commission's Exhibit, for identification, 3355-H and I as a part of the tran-
48274 script before the Interstate Commerce Commission of October 7, 1925, and also calling your attention to Commission's Exhibit, for identification, 3350-A to E, would you say that the references attributed to you, or statements attributed to you on this Commission's Exhibit, for identification, 3355-H and I are to the conference which is recorded on Commission's Exhibit 3350?

A. Well, I can't keep these numbers in mind, but I will say this about the—probably on October 6, 1925, a con-

ference was held between the cement people and the representatives of the railroads which I attended, held at Trunk Line Association in New York, and a record of that conference was made which I was signed by the conference chairman, D. T. Lawrence, but which I dictated, and—

Q. Will you say Commission's Exhibit, for identification, 3350-A to E is a record of that conference?

A. Yes; that is right, a record of that conference of October 6, 1925, and then I think we went before the Interstate Commerce Commission the next day at Harrisburg, October 7, 1925, and as chairman of the law committee I told the Commission as well as I could what happened and what we had agreed to in reference to rates.

Q. That is referring to the conference of the previous date?

A. Yes, certainly.

Q. And what you said to the Commission appears on this Commissioner's Exhibit, for identification, 3355-H and I?

48275 A. That is correct.

Q. Now, I call your attention to Commission's Exhibit 3356-A and B; is that a letter signed by you, that is, a photostat of a letter signed by you?

A. It is.

Q. And I also call your attention to Commission's Exhibit 3357-A to C; is that a letter from you to the Interstate Commerce Commission?

A. That letter is signed by me—what is the date of that letter,—October 25, 1928. That is my letter, addressed to Mr. Butler, yes.

Q. Now, I show you Commission's Exhibit, for identification, 3351-A and B. What can you tell us about that letter?

A. Well, I can only tell you that that is a copy of a letter that purports to have been sent to Mr. Guy by Mr. Young, which was in my files, and it was—I have every reason to believe—its location in the file was, of course, sent to me as part of the whole cement controversy.

Q. That is part of negotiations about which you have been talking?

A. Yes.

Q. Now, I show you Commission's Exhibit, for identification, 3353-A and B. What can you tell us about that?

A. 3353-A and B, that is a letter which I wrote, dated May 7, 1926, to the various law representatives of 48276 the Trunk Line railroads about all these dockets, cement dockets 1, 2, 3, 4, that were then before the Interstate Commerce Commission.

Q. And I show you Commission's Exhibit, for identification—

A. I ought to go a step further, then, before the interstate Commerce Commission in my charge for the railroads as chairman of the railroad committee.

Q. I show you Commission's Exhibit, for identification, 3352-A to C, inclusive, and ask you to state what you can tell us about that.

A. Well, that is a memorandum, I know that, dated March 8, 1927, that I, myself, prepared from my files, sending copies of it to, certainly, our own Lehigh Valley officers. I do not know how much further they were distributed, in reference to the dockets that are referred to at the top of the memorandum. Those are the same dockets that were before the Commission, and I was chairman of the committee, or counsel, taking care of those dockets on behalf of the railroads.

Q. And that records what was taking place as of that date?

A. Yes, that tells about a conference that we had, or that I had.

Q. Mr. Barrett, you, at the time that these negotiations were going on; also knew that Mr. R. N. Collyer, chairman of the Trunk Line Association, was interested and participated as well, did you?

A. Oh, yes. I do not know that he attended all the 48277 conferences, but he was present at many of them.

Q. And in so far as he was present and thus interested, he participated, as you recall?

A. I would hesitate to answer that because he was chairman and sometimes the question before the conference were simply those in which the chairman was absolutely neutral and took no part. He would take part when he was required to do so, and he was a man of high technical knowledge in reference to rates and was nearly always asked technical questions, and answered them.

Q. Now, these documents that we have been calling to your attention, about which you testified as records of these conferences and negotiations, and made at the time ac-

curately and as far as humanly possible to do so, recorded what took place in those that you made up yourself?

A. To the best of my ability they did,—and knowledge.

Q. I would like to ask you to again refer to Commission's Exhibit 3355-A to O, inclusive, being a certified copy of a portion of the record of the Interstate Commerce Commission in this proceeding, their Docket 15380 concerning Lehigh Valley cement rates; if you need to, will you refer to that and tell us what, if any, action the Interstate Commerce Commission took in the disposition of the complaint that was then before it, and which you handled in opposition to the cement manufacturers as they filed it?

48278 A. There were so many of these complaints that it will be necessary for me to look at the record to see what was done with these particular complaints.

(The witness is looking at a paper.)

A. The complaints were dismissed. That was my impression, and record of the Commission for the 9th of November, 1925, shows they were dismissed.

Q. So in that connection the Commission did not issue any order establishing rates by—that is, under its laws and regulations—pursuant to those complaints?

48279 The Witness: The three complaints that were before the Commission at Harrisburg on October 7, 1925, were Docket 15380, and Sub. No. 1 in that docket, and Sub. No. 2 in that docket, and those three complaints were dismissed by the Commission pursuant to the request of the railroads, and the cement people, I assume, joined the the request.

48281 *Examination on Voir Dire by Mr. Leisure.*

Q. Judge Barrett, on this exhibit, the first one that I picked up, Commission's Exhibit 3307, did you write
48282 or receive that letter personally?

A. Why, I have not seen this; I do not know.

Q. Well, it has just been offered in evidence.

A. I was not examined about that.

Q. On your identification, Judge.

A. Oh my identification?

Q. It has just been offered in evidence by Counsel for the Commission, this memorandum, and that is what I want to know—I do not know anything about it.

Q. You do not know anything about Commission's Exhibit 3307 at all?

A. I do not know anything about that at all. That is 3307? I do not know a thing about it.

48284 Q. Judge Barrett, I want to show you another exhibit that has just been offered at this time. It is a letter purporting to be on the letterhead of the Universal Portland Cement Company dated October 11, 1926. Did you either write the letter or receive it?

A. I never saw it. I do not know anything about it.

48285 Q. Judge Barrett, when Mr. MacIntyre examined you a moment ago and showed you some of these reports that you had made subsequent to conferences or meetings that you had had, he asked you concerning two of them, whether or not they referred to your testimony before the Interstate Commerce Commission, and one of them you said was after your testimony before the Interstate Commerce Commission.

Now, I note that you did not use any number, so that I am not sure that the record is clear as to which one you had reference to. Could you just tell us that again and refer to it by number.

A. Yes. Where is the number? I will take this one first, Commission's Exhibit 3350-A. Now, there are some letters there, A, B—

Q. It goes through to the last letter, I believe.

A. To E.

Q. To E; yes, sir.

A. Now, that is dated October 6, 1925, and that was the day before the hearing at Harrisburg, which was on October 7, 1925, and I did not testify there, but, as counsel, simply made a statement, and in my statement I referred to the meeting of the preceding day, that I said ended yesterday about 4:30 o'clock.

48236 Now, then, those two, Exhibit 3310-A is, and I suppose other letters there, 3310-A to 3310-D, is a memorandum of conference at which I presided at, May 19, 1926, long after the dockets referred to right there had been dismissed by the Interstate Commerce Commission referred to, when I said right there in that exhibit—what is the number of that, 3354.

Q. Now, in point of time, this Exhibit 3350-A was a conference the day before you made the statement?—

A. To the Commission.

Q. —that you have referred to and is represented by Commission's Exhibit 3354?

A. That is right.

48291 Q. Referring to Exhibit 3310-A to D, that is a record, as I understand it, which you made after a conference you had with certain people, and it is all represented there?

A. Yes.

Q. To the best of your knowledge, at that time?

A. To the best of my knowledge, at that time.

Q. And this came from your files?

A. I think that is the one.

(Mr. Leisure exhibited a document to the witness.)

A. Yes.

Q. Now, when did you get any request to produce that particular document?

A. November 7, 1940.

Q. At the time you prepared that document, was it your intention or your desire to enter into any kind of conspiracy with the cement companies, in violation of any federal or State laws?

A. It certainly was not.

Q. And when you made this record, to the best of your knowledge and belief and ability, you were reporting a transaction which did not involve any conspiracy of any kind on your part; were you not?

48292 A. Well, I can't answer that, because I never thought of such a thing. I never dreamed of such a thing.

Q. Well, Judge, I am merely asking for the facts about this transaction, and I am asking you, as you review the matter today, having refreshed your recollection

48292 now, as a witness, whether or not there are any facts in your mind that you can bring forward today indictating to you, or indicating on behalf of your company, that they were facts which could or would give rise to any inference of collusion or conspiracy on the part of yourself or your company?

The Witness: I would just have to say this, Your Honor, that I suppose I attended probably twenty-five conferences; maybe more than that; maybe less, in reference to this, and I probably have attended 500 during my time. That is what we do in every single rate case; we will have

a conference with the people who are complaining to us—have 10 conferences, if necessary; so I don't know anything about it. I did not know what this is all about, and I don't know yet, but I am just trying to tell you that that is what we do all of the time, and have done it, and are compelled to do it by the Interstate Commerce Commission. Sometimes they will send somebody up to one of the
48294 conferences.

By Mr. Leisure:

Q. Let me ask you this: Did you talk to Mr. MacIntyre about any of these exhibits?

A. Certainly.

Q. Did Mr. MacIntyre tell you that your company in this very proceeding has been charged by Counsel for the Commission as being a conspirator in this proceeding?

A. No.

Q. Sir?

A. No.

Q. And you dealt with these cement companies in this conference in the same manner as you dealt with, as you said, some 500 other different industries; is that correct?

A. Taking it over 30 years, I suspect there have been 500.

Q. Well, a great many.

A. A great many.

I think I should say, Your Honor, at the same time I was the chairman of the committee trying the Eastern Class Rate case, on which there were so many conferences, and also trying the Anthracite Coal Rate case; so you can readily see that I cannot remember any of the details, and I attended dozens of conferences with shippers.

Q. And you handled them all in the same way as you handled this one?

48295 A. As far as I know.

Q. Now, since the question has been raised here, Judge, and since you are on the stand, I want to ask you to answer a question as to whether or not you had any intention, as far as you are concerned, of violating any federal laws or any State laws, as far as trying to break any laws is concerned, whether they be anti-trust laws or any other kind of laws, when you held these conferences?

A. No; on the contrary, I never dreamed of it.

Q. Is it customary for different shippers when they have problems to take up, to get together on committees

and take them up in a group with the railroads? Is that the customary procedure, or is it some very unusual thing, that you never heard of?

48296 A. Oh, that is the customary procedure all the time. It is going on now.

By Mr. Leisure:

Q. Would you go so far as to say it is not only customary, but essential, in order to deal with them?

A. Absolutely essential for us.

Trial Examiner Norwood: Objection overruled. Go ahead.

That is, you testify that those meetings were neces-
48297 sary in the course of transacting business with these people?

The Witness: Yes. The railroads—everybody knows it—cannot discriminate, and there is only one way I know of to find out whether you are discriminating. I am talking about rate cases now.

Trial Examiner Norwood: Yes.

By Mr. Leisure:

Q. And the one way is the one that you have been describing; is that correct?

A. Yes.

I suppose I ought to say for His Honor's information that the shippers have—I think they call it the shippers' advisory conference, you know, these organizations, and we have these problems up all the time.

Q. I take it from what you said that it would not be practicable to deal with the different industries separately, dealing with one company at a time, but it is necessary for you to deal with them in a group?

A. Well, it certainly is necessary unless we had an army of officers and employees at work, and then
48298 I don't know how they would ever accomplish anything, as we are trying to avoid discrimination between shippers, and to do that we must confer, and do confer, with many shippers at all times.

Q. And do you, and also the Interstate Commerce Commission, ask the shippers to group the complaints?

Trial Examiner Norwood: You may tell us what the Interstate Commerce Commission does, if you know, and not otherwise.

The Witness: I would rather not answer that question. I know it from hearsay, of course.

Mr. Leisure: I corrected the question and said I would leave out the "Interstate Commerce Commission."

By Mr. Leisure:

Q. Just tell us what you do.

A. Well, we try to have that done. When I say "we," I refer to the railroads in Trunk Line Territory.

48306 Q. Now, Judge Barrett, here is another exhibit that has just been offered through you. The exhibit is numbered 3309-A to E, and it purports to be addressed to Mr. R. N. Collyer and signed by a Mr. W. Young, chairman. Did you write the letter or dictate it?

A. No; neither one.

Q. Did you receive the letter?

A. No.

Q. Do you know anything about the letter?

A. No.

48307 Q. Exhibit 3350-A to E is also another record that you made with regard to these conferences; is not that so, Judge Barrett?

A. Yes, although it is signed by the chairman of the conference.

Q. You dictated it?

A. Yes. This language in it is what makes me feel certain that that is true.

Q. It presents, to the best of your knowledge, what transpired?

A. It does.

Q. Without my taking a lot of time in going over all of these other questions that I asked you before—

Q. (Continuing.) —as to the customary way of dealing with shippers and as to your intentions or not to violate any laws, and so forth, the same testimony applies to these as to those?

48308 A. It does.

Q. Without our going over all of that.

A. It does.

48309 Q. Judge Barrett, I call your attention to Commission's Exhibit 3351-A and Commission's Exhibit 3351-B, which purports to be a letter dated July 1, 1926. Is that right?

A. Yes.

Q. Written by a Mr. W. Young to a Mr. F. E. 48310 Gay, and I ask you if you either dictated the letter or signed it, or received it?

A. No. Do you mean did I receive the original?

Q. Yes, sir.

A. I did not.

Q. Was a copy of the letter forwarded to you?

A. It was with the note that is shown in the corner by Walter Young whose writing, I think, I would recognize. That is all I know about it.

48311 Q. You say you did not receive the original of that. Did you mean to say that you did not receive this as a copy of the original? I am referring now to Commission's Exhibit 3351-A and B.

A. Oh, no. I tried to bring out—

Mr. Leisure: I think that is clear. The Judge said he received his copy.

A. Here on the corner it is marked "Mr. R. W. Barrett: Please note. W. Young." I pointed that out to Mr. Leisure.

Mr. Leisure: I think that is very clear.

A. I saw it taken from my files. Apparently it has been there for years.

Trial Examiner Norwood: Proceed.

Examination on Voir Dire by Mr. Leisure.

Q. Judge Barrett, I take it—I do not want to spend much time on this Exhibit 3353-A and B—I take it that that was written under similar circumstances to these other reports that you made, 3350-A et cetera; that is, you dictated something after a conference. Is that correct?

A. That is true, and sent to the law committee in the cases shown there.

48314 (COM. EXS. 3307, 3308, 3309-A to 3309-E, 3310-A to 3310-D, 3350-A to 3350-E, 3351-A, 3351-B, 3352-A to 3352-C, 3353-A, 3353-B, 3354, 3355-A to 3355-O, 3356-A, 3356-B, and 3357-A to 3357-C, were offered and received in evidence.)

48315 *Cross-Examination by Mr. Leisure.*

Q. Judge Barrett, in looking at these documents that have just been received in evidence, I observe the word "basing" point appears from time to time in the language in connection with the railroads. I take it that

you are referring to railroad basing points, and had no reference to any other basing points?

A. Railroad basing points. I referred to railroad basing points.

Q. And just so that the record will be clear, what
48316 do you mean by that?

A. Well, I mean that rates are made on some basing points, and that is using the word itself, to define it, but that is the location from which a general group of rates may be made and rates from adjacent points—I say "adjacent" for want of a better word.

For instance, we used for many years Pittsburgh as a basing point for steel rates, and all rates were made with relation to that—not all, but a great many—and cement the same way, and anthracite coal. Of course, that is very easy, because you have only three districts. Many illustrations can be given, but the rates from that basing point control adjacent territory.

Q. And that is the sense in which it is used in these documents here?

A. That is the only sense in which I knew it or know it.

48317 *Redirect Examination by Mr. MacIntyre:*

Q. Judge, you were just talking about basing points. Did you come to recognize Northampton in the Lehigh Valley district as a basing point for cement rates out of the Valley to other points?

A. Yes. Well, I would like to call it the Northampton district rather than just Northampton, because Allentown was in it and other adjacent points. I think we have referred to it as the Northampton basing point.

Q. And that, of course, took a single rate to these outside districts, where the shipments were made from any other mill in the Lehigh Valley to the outside?

A. We did after the rates were established in that way.

Q. Now, calling your attention again to Commission's Exhibit 3355-O, the order of the Interstate Commerce Commission in this Docket No. 15380, concerning the Lehigh Valley rates—and this is an order of dismissal of the complaint—I will ask you to state whether or
48318 not you have any knowledge of any order of the Interstate Commerce Commission which antedated

the dismissal of the complaint in that case, establishing uniform rates from the Lehigh Valley to outside points on cement, and thereby establishing Northampton as a base?

48319 A. No; I know of no order similar to the one referred to in the question.

Trial Examiner Norwood: Would you have known about it if there had been one?

The Witness: I believe I would have known about it. I would not now know about it, except from my general knowledge in remembering litigation that occurred after its dismissal. I would be reasonably certain that they had not fixed those rates at that time, but I have not looked it up, of course, for years.

By Mr. MacIntyre:

Q. A further question, Judge:

Mr. Leisure asked you on cross-examination as to what your intention was in these conference that you had.

48320 He asked you if it was your intention to violate the law. I will ask you now what was your intention in attending these conferences?

A. Well, our intention was to conserve the revenues of the railroads solely and purely.

Q. And do you know whether the cement manufacturers' intention was to eliminate or promote price competition among themselves in their dealings with you?

A. No, I do not know anything about that, of course.

48321 Q. Now, you have told us that you did not know what the intentions were. Will you now give us some information which will permit someone else to conclude probably what the intentions were by answering this question:

Did you ascertain from the cement manufacturers at that time as to what they desired with respect to railroad rates from the Hudson district and from the Lehigh

48322 Valley district?

A. Oh, yes. That was clearly set forth in the complaints that were filed. There are three—don't forget there are three complaints involved in this I. C. C. exhibit, the different—the Hudson people wanted to get to New England and to New York on lower rates than the Lehigh district, naturally, and Howes Cave and Glens Falls were farther away than the Hudson, and they wanted to

get to New England and points in New England, and not only on lower rates than—as low rates as Hudson—but lower than the Lehigh district.

Now, that states, I think, the facts; of course, back of all this was the decision of the Commission in establishing the cement rates, as I said before, in C. F. A. territory, and in Western territory, and they wanted us—and when I say "they," I do not mean all of them, but the general—my knowledge at the present time, as I remember the facts was, that they wanted us to make a cement scale to reach New England that would be a percentage of the C. F. A. scale, mileage scale. Now, we bitterly opposed that, as I stated this morning, because of the great loss of revenue.

Now, if I have not told that in detail enough, I can go further, because as I think I said this morning that the idea was to make the Northampton district a sort of a basing point from which we would have rates to New England points that would ultimately flatten out to be
48323 the same to the more distant New England points.

Q. And did you ascertain whether or not that was the desire of the cement manufacturers as expressed to you?

A. Yes, I thought that we had all agreed on that once. When we dismissed this petition, but you know what happened afterwards, so I don't know what they really desired.

Q. And did you ascertain in expressions made by cement manufacturers to you what their desire was with respect to the relation of Hudson Valley rates and Lehigh Valley rates?

A. Oh, they fought over that. You see, Hudson Valley had the water transportation to New York, the great market; the Lehigh Valley district wanted to lower rates to meet the Hudson rates to New York by water, and the Hudson people, Mr. Walter Young representing them, I think, at that time solely, wanted the rates—he objected to that, and we were continually at it trying to harmonize them and trying to save our revenues.

48325 Q. Can you tell us, Judge, whether anyone attended those conferences to which I have just referred in the preceding question to which objection was sustained, represented the public interest on one side as contrasted with or compared with the railroad shippers

or the railroad carriers or the cement shippers on the other?

A. No one present at those conferences of that sort except myself, if you will allow me to add a little facetiousness to that answer. There was no general public repre-
sentative as often appears at the present time in
48326 these conferences, as you know.

Q. Well, did you, or anyone else that you can recall, raise the question during the course of these conferences as to whether the public interest would be protected against price fixing by cement manufacturers if the re-
quest of the cement manufacturers were granted?

48327 A. No, I never heard of price fixing in any of those conferences.

By Mr. MacIntyre:

Q. And no one raised the question as to whether or not this would result in price fixing?

A. No.

Q. Or aid in price fixing during the course of the conferences?

A. No one that I ever heard of because it has never been in my mind.

Q. And no one suggested how it would aid or lack in aiding such a thing?

A. The subject was never mentioned, to my knowledge.

Q. Did the cement shippers suggest that they desired this for the purpose of meeting competition of one as against the other on an equal basis?

A. I never heard of equal basis—on a fair basis, that is the word the shippers all use.

Q. Did you ever ascertain from them what they meant by the word "fair"?

A. Oh, yes. Now, I am not speaking of remem-
48328 bering what was done here, but the word has been used so often I have no doubt it simply means the differential one shipper is going to get under another as to rates, what he thinks his differential should be is fair to him, what the other fellow thinks it should be is fair to him, and the railroads are between the devil and the deep blue sea, and these shippers.

Trial Examiner Norwood: Where does the consumer come in there?

The Witness: Now, he comes in—we get a special pleader over here in the Coal Commission,—I am referring to anthracite coal rates,——where we have the most litigation, rate litigation.

Recross-Examination by Mr. Leisure.

Q. Judge Barrett, as to these companies that Mr. MacIntyre mentioned trying to get as favorable rates as Lehigh, some companies wanted one thing and some wanted another; isn't that correct?

A. Oh, yes.

48329 Q. And did you regard it at that time, or do you now, as anything unusual that these companies doing business at different places should try to get rates as favorable to themselves as they could get them?

A. Why, I would rather speak of it as then.

Q. Yes.

A. But it was the thing that happened in every rate case, and I did not have any particular regard for it one way or the other.

Q. It was the usual thing, as you regarded it, with various industries at that time; is that correct?

A. Yes, I can name the industries. I think I said I was carrying on at that time three rate cases, anthracite coal, and these cases and the Eastern Class Rate cases.

Q. Now, you said you know what happened to this thing later on. Were you referring—Let me show you Commission's Exhibit 3353-A, to the case here which I have checked. You can read it and tell us whether or not that was what you were referring to when you said you knew what happened later on, that docket number.

A. That is—well, that is one of the cases, 18—

Q. What happened, Judge?

A. I do not know except that we fought them, that is all I know about it, don't know how we came out or what happened. We ultimately got the rates put in, some
48330 kind of rates, and I did not take the trouble to look it up.

Q. But the Interstate Commerce Commission did issue the order; you know that, Judge?

A. Yes, ultimately.

Q. Sir?

A. Ultimately, yes.

Q. Now, Mr. MacIntyre asked you about whether or not there was anyone present at that time, and you said such as now often appears in the hearings. Was it the practice for people to appear prior to that time, or during that time, representing the public interest from governmental bodies?

A. Oh, no. I did not refer to different governmental bodies. That is true, that it was not the practice. At the present time we will have occasionally an Interstate Commerce Commission representative, and we very often have traffic managers, for instance, for the City of New York, or at that time traffic managers, I remember, it was, I think—no, I won't say. The traffic manager for the City of Boston, it was my impression that he appeared later in these cases, but at that time it was not the custom, and we did not have them. It has grown up since then.

Q. It was not the practice at that time, as I understand you, when business men got together to discuss their problems on opposite sides, to have any sort of a Government referee?

A. No; not that I know of.

48331 FRANK H. JACKSON, being called as a witness for Commission, and being first duly sworn, testified as follows:

Direct Examination by Mr. Wooden.

I am associated with the United States Public Roads Administration as senior engineer in tests, in charge of the section on non-bituminous road material testing of the Division of Tests. That includes cement testing.

48332 I have been associated with the organization ever since October 1, 1905. I have held my present position for 15 years or so. I am in charge of the section of the testing division of the organization, which has to do with tests and inspection of what we term non-bituminous road materials, including Portland cement, reinforcing steel, paving brick, culvert pipe, stone, sand, gravel, and other materials of like nature. During the course of my employment I have become familiar with the strength

characteristics of standard Portland cement and other forms of Portland cement. Until very recently the chief exception has been the cement known as the high early strength cement. During the course of my employment I have been a member of a committee having to do with
cement specifications on which the industry was
48333 represented; that is, Committee C-1 on cement of the American Society for Testing Materials. I served on that committee as a representative of the consumer group. I held a personal membership in the American Society for Testing Materials, and was designated as a member of that committee because of my interest in Portland cement, that is, the technical side of the problem entirely. I had been a member of that committee for about 15 or 20 years; I do not recall the exact number of years. I was secretary of the committee for approximately six years from, I think, 1926 to 1932. I have continued to be active in the committee up to the present time.

48333 Q. What is the set-up of this committee C-1 to which you referred as to its make-up?

A. This is one of the many technical committees of the American Society for Testing Materials which has jurisdiction over specifications for Portland cement. It is composed of representatives of three groups, the con-
48334 sumers, the producers, and a group known as the general interest.

Q. Which group, if any, has the majority representation on the committee?

A. The regulations of the organization require that the producer group shall not predominate. At the present time I think the numerical representation is almost fifty-fifty; I am not sure as to the exact.

Q. Do you mean fifty-fifty as between the producers—

A. As between the producers on the one hand and the general interest and the consumers on the other.

Q. Have you been in a position, Mr. Jackson, to observe the practical operation of the committee from
48335 the standpoint of the practical predominance of influence in the committee?

A. If you would conclude from that that active participation in the work of the committee and its subcommittees constitute such possibility of observation, I would say yes.

Q. Well, what is the result of your observation and experience as to the degree of practical control over the functioning of that committee exercised by the producers' representatives?

48337 A. In my opinion there has been a distinct evidence during the years of predominating influence of producers' representatives on this committee.

By Mr. Wooden:

Q. Notwithstanding your testimony that the paper set-up provided for equality of representation between

48338 producers and other groups?

A. That is true.

Q. Now, will you explain how such predominance, as you stated in your last answer, what form it took, or how do you account for it in view of the paper set-up to which I have referred?

A. You mean how it might be brought about?

Q. Yes, how in your opinion it occurred.

A. In spite of the theoretical balance which is shown on paper, there is a natural tendency for the producer group on this committee to exercise dominant influence due to the fact that the representatives of the producer group are primarily interested in this one problem, they are employed by the manufacturers to follow the trend in the development of cement specifications, that is their major interest, whereas the consumers and the general interests on this same committee have many interests, diverse interests, many other materials of interest in addition to Portland cement.

Another thing, they are not nearly so—it is not nearly so easy for them to obtain necessary traveling expenses to go to committee meetings as the representatives

48339 of the producers. There are many somewhat more intangible reasons and they all tend to give the producers an advantage out of proportion to their numerical representation. Now, if I may just add to that, that is not a characteristic peculiar to the cement group in this Society. It applies to other technical committees of the A. S. T. M. as well. It is a weakness, an unfortunate weakness, in the set-up which is very difficult to correct.

Trial Examiner Norwood: Would you say there is an equality with respect to membership?

The Witness: That is right.

Trial Examiner Norwood: Is there an equality with respect to attendance, or not?

The Witness: No, sir; the attendance is predominantly representative of the producers.

48340 By Mr. Wooden:

Q. Mr. Jackson, based on your experience and contacts in the work of the committee, what would you say with reference to whether the consumer groups represented on the committee have been able through the years of your knowledge and observation to have the committee adopt and put into effect specifications which the consumer group wished put into effect?

48342 A. As I have stated, there has been a tendency, in my opinion, throughout the years, for the producer group to dominate somewhat in the deliberations of the committee. However, there has been accumulating a gradual tendency for the consumers to force the adoption of higher requirements and new specifications, which in turn, have been brought about through a demand from the consumers of Portland cement in general; that is, consumers outside of the organization and who really use the Portland cement.

Does that answer your question, Mr. Wooden?

By Mr. Wooden:

48343 Q. In part.

When did that accumulating pressure of the consumer groups begin to effectually manifest itself?

A. The first tangible manifestation was in 1930, when the A.S.T.M. adopted its specification for high early strength cement.

Q. Is it your testimony that the adoption of this high early strength specification was in response to consumer demand?

A. Largely.

Q. And pressure?

A. Largely.

If I may amplify that, Mr. Examiner.

Q. Yes, I will be glad to have you.

A. I am speaking largely of representatives of consumers of Portland cement used in highway construction, and through the years there was being brought to a head about that time a very definite and tangible demand on the

part of the highway user for the early opening of concrete pavements due to the demands of traffic, and due to that there was an insistence on the development of high early strength cement that would make it possible to open those roads sooner.

Q. Was there, in your experience and observation, any attitude of resistance on the part of cement producers to the inauguration of those new specifications?

A. Not particularly to the high early strength specification.

48344 Q. Was there any other specification or change in specifications that were advocated by consumer groups?

A. As I think I have stated before, there has been a resistance on the part of representatives of producers to any change in specifications or to any tendency to develop more than one type of a Portland cement.

Q. With the exception of high early strength; is that what you mean?

A. Yes; up to the present time. Of course, there has been a very recent development along that line. It has taken place within a year.

Q. How recent is that, did you say?

A. Within a year—the new A.S.T.M. tentative specifications.

Q. You have had occasion, I take it, or have you had occasion to observe through the years the performance of various kinds of standard cements, as well as high early strength?

A. A very good opportunity.

Q. Prior to the adoption of the high early strength specifications, will you state whether or not there was a difference in the performance of various kinds of standard cements?

A. I don't believe I quite understand your question, Mr. Wooden. You said the "requirements." Do you mean the "requirements" or "properties" of various cements?

Q. I said performance. I will say the "properties."

A. I understood you to say "requirements."

48345 There was only one requirement, of course—the standard A.S.T.M. requirement.

Q. Well, did the performance of the various standardized cements exceed the requirements of the A.S.T.M.?

A. Very largely. They exceeded them by various degrees.

Q. To what extent was there variation in the degree by which the various standard cements exceeded the minimum A.S.T.M. specifications?

A. You are referring now to strength specifications?

Q. Well, make it as broad as you can.

A. Strength is the usual characteristic upon which the quality of the cement is based, rightly or wrongly. I would say that prior to 1930, in so far as my observations through testing the review of test results are concerned, there was a very marked difference in the quality of different Portland cement meeting the minimum requirements of the A.S.T.M.

Q. How great was the range?

A. Well, I would say that the range would be almost 100 percent, based on the minimum requirement.

Q. Can you say whether or not some of the standard cements made during that period approximated the requirements of the high early strength specifications as later adopted?

A. Our tests, so far as my recollection goes, indicated that certain of the standard Portland cement approached the requirements for high early strength cement which were later adopted.

Q. Do you mean that prior to 1930 there were
48346 some standard cements that approximated or approached the high early strength specifications?

A. I might amplify that a little, that prior to the developing of the high early strength specifications there were certain brands of cement which developed strength very nearly as high as the requirements later adopted for high early strength cement.

Q. And since the high early strength specifications were adopted, has the situation changed in that respect?

A. Not very greatly. There has been a tendency for all cements to develop higher strength than formerly.

Q. Do I understand that since the high early strength specifications were adopted there is still a wide range in the qualities of standard cement?

A. Yes.

Q. Now, what is the chief respect, or what are the
48347 various respects, in which high early strength cement differs from standard Portland cement?

A. In two respects, chiefly. One is the development of strength at an early period, and the other is in fineness.

Q. Is there any relation between those two things?

A. A very definite relation; yes, sir.

Q. What is the relation?

A. The finer the cement the higher the early strength.

Q. Did the standard specification, the A.S.T.M. specification for standard cement, carry any fineness requirements?

A. They did up until recently.

Q. Well, were those fineness requirements in the A.S.T.M. specification in effect prior to the time the high early strength specifications were adopted?

A. Yes, sir.

48348 Q. What did you mean, Mr. Jackson, by saying that "until recently" the standard specifications contained requirements for fineness?

A. I meant by that that within the last three years—I am not exactly sure as to the date; the record will show; that is, the proceedings of the Society will show that the Society deleted the fineness requirement.

Q. For standard cement?

A. For standard cement.

Q. Was that action opposed by any group within the committee?

A. It was opposed by an element of the consumer group quite strenuously.

Q. What element was that?

48349 A. Largely the representatives of the highway users. There may have been others. The consumers were not entirely a unit as to the necessity of retaining the fineness requirement, and there were a number of consumers, including myself, who believed that the fineness requirement was highly desirable and should have been retained. However, it was deleted.

Q. On what ground was the deletion of the fineness requirement for standard cement opposed by these consumer groups that you have referred to?

A. It was opposed on the ground that the fineness requirement safeguarded certain desirable characteristics of Portland cement, which would not be safeguarded if it were deleted.

Q. Mr. Jackson, you were just speaking before the recess about the deletion of the fineness requirements in the standard cement specifications. Have those standard specifications continued with the fineness requirement deleted?

48350 Trial Examiner Norwood: What is the approximate time?

The Witness: I would say the approximate time was 1937—along about that period.

Mr. Withrow: The record shows that it was July, 1938.

48354 *Cross-Examination by Mr. Leisure.*

48358 Q. Now, this committee, when it first passes upon any of the specifications, are those tentative in the beginning, and do they try them out first, or are they more or less in final form?

A. They are tentative always.

Q. And what happens after that, Mr. Jackson?

A. They are either revised and continued as tentative, if it seems to be desirable to do so, or they are made standard on vote of the Society, but a standard has to go through the tentative stage before it becomes a standard.

Q. And then they are tried out in that tentative period, are they not?

A. That is right; yes, sir.

48359 Q. And if weaknesses develop are they changed?

A. Presumably they are revised. That is the object of this tentative stage.

Q. How long a period does that cover, if you know?

A. It must be at least one year. It may be an indefinite number of years. The rule of the Society is that the tentative cannot be continued tentative more than three years without an explanation as to why it is not made a standard.

Q. Now, so far in the discussion that Mr. Wooden has had with you, Mr. Jackson, and in the discussion that I have had with you so far we have been dealing with consumers and producers. As a matter of fact, there are many scientific men on this committee who have no personal ax to grind one way or the other, who vote on these problems; isn't that so?

A. That is true.

Q. And that fact is one of the things that gives this A.S.T.M. the high standing that it has in the community; isn't that so?

A. I think I indicated at the beginning, didn't I, the setup of this committee on response to a question,—the three groups that constitute it, consumers, producers, and general interests.

Q. Yes, but the discussions after that time were about producers and manufacturers, I believe; that is why I want to emphasize it.

A. Yes.

48360 Q. Producers and consumers, excuse me.

Now, I think you said—and you correct me if I am wrong—that around 1930, was it, that the influence of the consumer group began to grow, or just what was that?

A. As I recall, I stated that around about that time the influence of the consumer group as representing the urge for a high early strength cement resulted in the—or grew to such an extent that it resulted in the establishment or adoption of the high early strength specification.

Q. And I am correct, am I not—I have not got the record before me, you said around 1930?

A. I think the high early strength specification was adopted in 1930. I have not the record before me, either.

Q. And there were, were there not, Mr. Jackson, high early strength cements sold long before that, prior to 1930?

A. Well, I would not care to say just how long before that they were sold as such. Possibly standard Portland cements very nearly meeting the requirements of high early strength cement may have been sold.

Q. No, I mean high early strengths were sold as high early strengths prior to 1930; you know that, don't you?

A. Probably somewhat before that; oh, yes. But I do not know just how long before.

48361 *Redirect Examination by Mr. Wooden.*

Q. Will you state whether or not, Mr. Jackson, prior to the adoption of the high early strength specifications that there were some standard cements sold with special stress being placed in their sale as quick-setting cements?

48362 A. I would say that there was a tendency along that line due as I have mentioned before to the urge on the part of the consumer, the user, for cements for road construction which would develop high early strength.

By Mr. Wooden:

Q. And that was prior to the high early strength specifications being adopted; is that right?

A. Yes, sir. It was one of the factors which led to the development of the high early strength specification.

48363 Q. Did the presence of scientific members on the committee—what difference— I will reframe it again:

What difference did the presence of scientific members on the committee make in the functioning of the committee with reference to the matter that you have testified about of predominant producer control?

The Witness: Well, it depends a good deal on how you define the scientific representative. Most of the men on the committee are scientific men. To the extent that it is supposed to be a technical committee, they are
48364 composed of men, of technically trained men, and the mere question of their qualification as consumer, general interest, or producers hinges entirely on their employment, not their knowledge.

Trial Examiner Norwood: Well, were more of them employed by the producers than otherwise?

The Witness: I would not care to commit myself on that without reviewing the membership of the committee.

By Mr. Wooden:

Q. How do you account, Mr. Jackson, for the wide difference in the quantities of standard cement which you have testified about?

48366 A. I account for it by differences in composition of cements and differences in methods of manufacturing cements employed by different companies.

By Mr. Wooden:

Q. Did the differences in manufacturing meth-
48367 ods which you referred to, to what extent did that have any relation to differences in modernization of machinery?

A. Speaking first of composition, it is well known that the relative percentage of which—the various oxides used in the manufacture of Portland cement exists controls the quality of the finished product. In a general way, that will take care of the matter of composition. Now, in the matter of manufacture, it is also well known that not only the fineness of the cement, which is a function of the care used in grinding and the amount of grinding, but also the character of the burning, the burning of the clinker
48368 and the cooling of the clinker greatly influence the quality of the product. The Portland Cement Association is spending thousands of dollars a year to investigate those problems right now.

By Mr. Wooden:

Q. My question was directed to whether or not differences in the degree of modernization of machinery had anything to do with it.

Trial Examiner Norwood: You may answer that question.

A. I would not care to go into the question of machinery used, explicit machinery used in cement plants.

By Mr. Wooden:

Q. You would not see any relation between that and the degree of fineness of grinding?

A. Well, of course, it is true that more modern equipment has made it possible to grind cement finer and they are ground much finer now than they used to be. There is no question, the general tendency has been towards finer grinding right along for years, and that has been made possible through modernization of equipment.

Q. And do you also mean that the degree of fineness varied considerably between the different plants?

A. Very greatly, very greatly.

49369 *Recross Examination by Mr. Leisure.*

Q. Mr. Jackson, you said that they varied in degrees of fineness, these different cements.

A. Yes, sir.

Q. Do you have any particular brands in mind?

A. No, sir. I am simply refreshing my memory as the results of tests which I have seen personally going through our laboratory.

48371 Q. Prior to, say, April 1, 1937, how many mills did you examine as you described with respect to fineness?

A. During the full period of my interest up until recently my observation has been confined largely—that is, in so far as tests are concerned, the results of tests—my observation has been confined largely to the scrutiny of test reports which have come over my desk from the laboratory. Samples of cements submitted from our various federal aid road jobs all over the United States come to us for tests and the results go over my desk before they go out. My observation is based on the scrutiny of those results.

48372 Q. What is your best judgment as to how many mills were examined in any one year?

A. The number would vary from as low as twenty to twenty-five up to a maximum of a hundred, possibly, year by year. Now, understand I am relying entirely on my memory here. I have not the records before me. I could hardly be expected to remember, as far as I know just exactly the number of mills that I have examined each year.

Q. And your best judgment would be that the lowest number in any one year that you have tested would have been about 25; is that correct?

48373 Possibly that; yes, sir.

Q. And you think it might have gone as high as a hundred in some years?

A. Yes.

48374 Q. Now, you told Mr. Wooden that there was a demand on the part of the consumer group, on his redirect examination, you told him there was a demand on the part of the consumer group in highway con-
48375 struction which caused these high early strength specifications to be adopted; is that so?

A. Yes, sir.

Q. So in that instance, at least, the consumer group did make itself felt; didn't it?

A. Yes, sir.

Redirect Examination by Mr. Wooden.

Q. Does the quality of cement put out by a single mill, does it vary from time to time on its standard cement?

A. I would say so.

A. Yes, sir; not to the same extent as the product of different mills.

By Mr. Leisure:

Q. Different mills vary widely, as I understand it?

A. Yes, sir.

Trial Examiner Norwood: Does that consumer demand become evident to your organization directly or through the manufacturer?

48376 The Witness: No, it—you are speaking now of the organization, the official organization with which I am connected, the Public Roads Administration?

Trial Examiner Norwood: Yes.

The Witness: It became evident to us directly through our contact with the various State highway departments.

Trial Examiner Norwood: Well, does it converge on the manufacturers, also?

The Witness: Well, it is natural for the manufacturers, of course, to respond to a consumer demand, if they have to, and the competitive situation was such that it was necessary for them to eventually unite and support this high early strength specification. Until they did there was a competitive situation among the manufacturers which resulted in certain ones marketing, promoting, and selling a higher early strength cement than others.

48377 *Recross Examination by Mr. Leisure.*

Q. Mr. Jackson, Mr. Wooden asked you a question about cement companies advertising this high early strength. Do you know just what advertising campaigns were carried out?

48379 A. The matter of promotion was the question of the sales activities of the various cement companies. There was a tendency, as I think I have stated, for various companies to promote their own particular product from the standpoint of strength primarily, because of this urge for a higher early strength cement for use in road construction. This promotion was on the part of sales organization. It is a matter of common knowledge that everyone familiar with the situation knows that to be true.

48389 Washington, D. C.,
Friday, November 15, 1940.

48391 (COM. EXS. 3311 to 3322, 3323-A & B, 3324 to 3326, 3327A. & B, 3328 to 3334, 3335-A & B, 3336-A & B, 3337 to 3346 and 3347-A & B, 3348 and 3349 were offered and received in evidence.)

PAUL T. DAVID, called as a witness for the Commission, being first duly sworn, testified:

Examination by Mr. Wooden.

48392 At present I am chief director for research and acting director for the American Youth Commission of the American Council on Education. I was an employee of the Tennessee Valley Authority from May 31, 1933 to the latter part of 1936. During my connection with the T. V. A., I had contacts with the cement industry in that I was assigned to an investigation of that industry; or rather some service in connection with some negotiations during the summer of 1934.

The American Council on Education is not a Gov-
48393 ernment organization at all. It is a national council of all the major educational associations.

Q. In your contacts with the cement industry while you were associated with the T. V. A., did you meet and have contacts with Mr. John Treanor?

A. That is correct.

Q. Did you have any correspondence with Mr. Treanor during that period?

A. Yes, I had rather fragmentary correspondence with Mr. Treanor following the period in which I was associated with him.

Q. I am showing you two papers, previously marked as Commission's Exhibit 1109-A and 1109-B, for identification, which purport to be letters addressed to you by Mr. Treanor. Will you examine those and state whether or not you received those letters in the regular course from Mr. Treanor while you were connected with the T. V. A. (handing documents to the witness).

Mr. Withrow: What are those numbers, Mr. Wooden?

Mr. Wooden: 1109-A and B.

A. Yes; I am quite confident these are letters addressed to me, which I received. I remember the second one more clearly than the first. I am sure I received both of them.

By Mr. Wooden:

Q. When you say the "second" one, you mean 2209-B?

A. Yes, that is right.

Mr. Wooden: I offer these documents in evi-
48394 dence, Your Honor, Commission's Exhibits 1109-A and B, for identification.

Examination on Voir Dire by Mr. Leisure.

48395 Q. Now, in this other letter, 1109-A, it starts with:

"Enclosed please find copy of a letter which I recently addressed to the Commission."

What letter does that refer to, if you know, Dr. David?

A. I don't think I would be able to identify that from memory, after five years' time.

48396 Q. Dr. David, this letter 1109-A—where did it come from? Did you bring it to the Federal Trade Commission?

A. No, I have had no—other than telephone conversations, I have had no previous connection with these proceedings.

Q. Have you ever been personally present when Mr. John Treanor signed any documents? Have you ever seen him sign any papers?

A. I don't think I could swear to that.

Mr. Leisure: If Your Honor please, as to this Exhibit 1109-A, I am going to object to it unless and until the complete document is offered here. It seems to me we are entitled to have the complete document. You will observe that it says:

"Enclosed please find copy of a letter which I recently addressed to the Federal Trade Commission."

Now, I object to only a part of the communication being offered in evidence.

48404 (COM. EX. 1109-A was offered and received in evidence.)

48405 *Cross-Examination by Mr. Leisure.*

Q. Mr. David, this exhibit which has been received in evidence—and I will show it to you if you do not recall this—it starts off with: "Enclosed find copy of a letter which I recently addressed to the Commission." Do you know when the two letters got separated? Do you know where that letter is?

A. Well, I would assume they got separated when the Federal Trade Commission obtained the file from the T. V. A., but I would have no other way of knowing.

Q. They had the file?

A. So far as—well, I do not know that. I assume they must have had access to it or this letter would not be here. So far as I know, the two letters were together when I last put a rubber band around my folder of working papers. I—well.

Q. Did you attend the meeting referred to?

A. Which meeting?

Q. This meeting referred to in the letter received as an exhibit.

A. You mean the meeting of the industry?

48406 Q. Yes.

A. No, I am sure—

48407 Q. At the time these conferences were being held between T. V. A. and certain cement manufacturers, do you know whether or not any representative of the Federal Trade Commission was present?

Did you attend any of these conferences?

A. I do not recall that any Federal Trade Commission representative was present.

Q. Do you recall whether or not Dr. Fetter attended some of those conferences?

A. Yes, he did.

Q. And who did he represent, if you know?

48408 A. It is my recollection that he was retained as a consultant by the Tennessee Valley Authority. It is my understanding that he was also employed by the Federal Trade Commission at about the same period and perhaps at the same time.

Q. I notice in the second paragraph of this same letter, Mr. David, addressed to you, Mr. Treanor apparently says: "I have had further talks with members of the

staff." I assume he is referring there to the staff of the Federal Trade Commission, was he not?

48409 A. Well, it is my definite impression that it is the staff of the Federal Trade Commission.

48416 P. H. BATES, called as a witness for the Commission, being first duly sworn, testified:

Examination by Mr. Wooden.

I am chief of the Plain Silicate Products Division of the National Bureau of Standards and have held that position about 20 years. The nature of my duties in that position is both research in connection with the various types of commercial silicates, of which Portland cement is one, and in the case of Portland cement, in charge of the testing of a great quantity of it bought for the various Government agencies. I am chairman of the Committee on Ce-

48417 ent of the Federal Specification Executive Committee, and also chairman of the Committee on Cement of the American Society for Testing Materials. I have been occupying such position with the Federal Committee since its inception around 1921 or 1923, and this is my 17th year as chairman of the Cement Committee of the A.S.T.M. which Committee is frequently referred to as Committee C-1. Before I became chairman of Committee C-1, I was secretary for a period. I have been a member since 1910 or 1911. In the course of my duties at the Bureau of Standards, and in the course of my activities as chairman of the C-1 Committee, I have become familiar with the various types of cement specifications and with the characteristics of various kinds and various types of manufacture of cement including standard Portland cement as well as special cements.

48418 Q. Now, confining your attention for the moment to a period prior to the adoption of high early strength specifications on cement, was there at that time a variation or difference in the characteristics or utilities of various brands of standard cement?

Mr. Leisure: Just a moment, please.

Now, if that question were to be allowed at all, I would certainly ask that the time be fixed that Mr. Woolen has reference to instead of just this general offhand way of

describing certain period; but before we get to that I want to object to going in to trying this case all over again on rebuttal. There is nothing whatever that has come up that is new that was not brought up in the first instance by Mr. Wooden, and then answered by us, which this question tends to bring out, and I want to object to going into it at this late date. I think that the objection should be sustained.

Trial Examiner Norwood: Read the question.

(Question read.)

Trial Examiner Norwood: What do say?

Mr. Wooden: I just want to say that Respondents in their defense spent many days with expert economists on the assumption put to them that cement was a wholly standardized homogeneous commodity.

Mr. Leisure: Now as to that, then, if that is the
48419 ground that it is offered on we should not waste much time on it because I am sure Your Honor recalls that the economists said it had nothing to do with the physical qualities of the cement; just that buyers would not pay more for one standard brand than they would for another; and, furthermore, this is cumulative; they went into this yesterday. It seems to me this repetition of testimony should end some time.

A. Yes.

By Mr. Wooden:

Q. When were the high early strength specifica-
48420 tions adopted, Mr. Bates?

A. Oh, about 1930, I believe.

Q. And you made your answer "Yes" to my question a moment ago as being applicable to the period prior to 1930; is that correct?

A. The period prior.

Q. Now, what was the nature and extent of those differences in various brands of standard Portland cement?

A. Well, as measured by strength, it might vary from 50 to 100 percent. Certain other properties would not vary as widely as that.

Q. And is the strength test considered a very important test?

A. It is.

Q. Do you consider it as important or more important than any other?

A. It all depends. For certain uses it would be the most important. For other uses, not as important.

Q. But not unimportant in any case?

A. Not unimportant at any time.

Q. Still confining your attention to that period prior to the adoption of high early strength specifications, were there any cements sold as standard Portland cement that approximated the standards which were later incorporated in the high early strength specifications?

48421 A. That I cannot say. So far as the high early strength is concerned, we were not accustomed to doing much in determining the early strengths, but I would say, in general, that we knew the standard, and we knew that considerable of the standard cements approach the quality of high early strength.

Q. Were there any of them that went beyond what the high early strength specifications later called for?

A. Yes; there were.

By Mr. Wooden:

Q. What have been the important differences between cement which met the high early strength specifications and cement met the A.S.T.M. specifications for standard?

48423 A. The major difference between them is a question of fineness.

By Mr. Wooden:

48424 Q. Beg your pardon?

A. Fineness of grinding.

Q. The major difference?

A. Yes.

Q. To what extent has the fineness of grinding been influenced by the development of modernized machinery?

A. The modernized machinery has resulted in an increase in fineness for the various cements.

By Mr. Wooden:

Q. Do I understand from what you said a few moments ago about the wide range in the characteristics and qualities and utilities of standard cement—or let me ask you this: was the varying fineness of grinding a factor 48425 in producing those different characteristics and utilities of standard Portland cement?

A. It was one of the factors.

Q. Were there some standard Portland cements which

approximated rather closely the minimum requirements of the A.S.T.M. specifications on standard Portland cement?

A. Yes.

Q. Was there any difficulty, so far as you knew, for any cement manufacturer to meet easily the minimum requirements of the A.S.T.M. standard specifications?

A. There were at times difficulties; yes.

Q. How far back does that go?

A. Well, I would say up until about 1922—along in there—the cement manufacturers had difficulties.

Q. Since that time what has been the situation?

A. Very materially changed.

Q. In what way?

A. In that they meet them with greater ease and a greater amount, as measured by strength and other properties.

Q. Has this difference, which you estimated ran from 50 to 100 percent—has that amount of difference in standard cements continued since the adoption of the high early strength specifications?

A. No, no.

Q. What has been the range since then?

48426 A. Well, from practically nothing to about 50 percent, I would say.

Q. Are there some cement producers that are not equipped, either with raw materials or with machinery adequate to meet the high early strength specifications?

A. I would say there are some manufacturers not equipped to make any high early strength cement.

By Mr. Wooden:

Q. To what extent does your answer there in-
48427 volve some manufacturers equipped by reason of their raw materials, and to what extent not equipped by reason of their manufacturing processes?

A. I could not say the relative amount.

Q. Are both of those factors involved?

A. Both of those factors are involved; yes.

Q. Can you say what changes, if any, were necessary on the part of some manufacturers when the high early strength specifications were adopted, in order to meet them?

48428 A. Actual plant changes were none at all. There were necessary certain operating changes.

By Mr. Wooden:

Q. Were there any manufacturers who had to make any substantial operating change?

A. Yes.

Q. Were there some who did not have to make any substantial operating change?

A. Yes. Substantial operating change?

Q. Yes.

A. I will have to have that again. There was some—repeat that.

Trial Examiner Norwood: Read it.

(Question read.)

Mr. Wooden: I mean operating equipment.

A. Operating of the equipment?

By Mr. Wooden:

Q. No.

A. Operating equipment?

Q. Operating equipment.

A. Yes; some did not have to change the operating equipment.

Trial Examiner Norwood: Well, you testified that none of them had to change the operating equipment; did
48429 you not?

The Witness: No, no.

Mr. Wooden: Some of them.

Trial Examiner Norwood: Go ahead.

By Mr. Wooden:

Q. Is the standard Portland cement put out at various times by a given mill always of the same quality?

A. No, it is not.

Q. How wide may the variations in the quality of the so-called standard cement put out by the same mill be?

A. That is difficult to answer, because there are well operated mills and poorly operated mills. In the case of the well operated mills the variation would be slight, from 10 to 20 percent. With the poorly operated mills it would vary, possibly, a hundred percent.

48435 "Q. With reference to the varying qualities and characteristics of standard Portland cement under the A.S.T.M. specifications, to what extent have those variations been the result of variations in the physical operating equipment of various plants?")

A. They may have been due entirely to the operation.

48445 Q. Now, coming down to more recent times, up to, say, July 1, 1937, recent years, have not many specifications required cement so fine that 95 to 99 percent would pass through this 200-mesh sieve?

A. Yes.

Q. And is it or is it not a fact that practically all cement in recent years passes through a 200-mesh sieve?

A. Yes.

48447 Q. Now, prior to 1901, the War Department, itself, requested different specifications for cement requirements; isn't that a fact?

A. Different from whom?

Q. I mean varying ones, if that will help you.

A. You mean various types, covering various types of cement? Yes, yes.

Q. And isn't it a fact that in 1901, or about that time, the War Department standardized its specifications itself?

A. That is before my time. All I can think back is historically, and I think that is about right, yes.

Q. Don't you know that to be a fact?

A. I believe that is about right, yes.

Q. And then coming down—when does your time

48448 start with the Bureau of Standards?

A. 1906 or '08—1906.

Q. Now, then, subsequent to the time we have just discussed, isn't it a fact that the American Society for Standards undertook to standardize specifications for cement?

A. The American Society for Testing Materials, yes.

Q. And in 1912, which was when you were with the Bureau, isn't it a fact that various Government bureaus and departments got together with the Bureau of Standards and prepared standard specifications for all Government work?

A. Yes, sir.

Q. As a matter of fact, those specifications were made effective by an Executive Order?

A. Yes, sir.

Q. And if you recall this I want you to tell me: Isn't it a fact that subsequent to the issue of that order in 1912 these requirements were more severe than the standards of American Society of Civil Engineers, and the American Society of Standards; do you recall that, or not?

A. They disagreed for a long time only—for some time only in one respect, and that was the fineness, and then finally they had a meeting and agreed.

Q. And you have reference now, I take it, to when these organizations got together with the Government and representatives prepared the standard specifications of 1917?

48449 A. That is about the time, yes.

Redirect Examination by Mr. Wooden.

Q. You said that this—as I understood it—that this 200-mesh test, that was easily met or exceeded, as I understood; that is the substance of my understand, long years ago?

A. No, no, you are wrong on that. No, I said on that question of long years ago the sieve was not really a measure of the fineness of cement,—long years ago.

Q. Well, what period did you refer to, or make it more definite, when you said long years ago?

A. Well, that, to my first connection with Portland cement.

Q. Back prior to 1910; is that right?

A. Yes.

Q. Was this agreement on fineness requirements with the Government, that occurred in 1917; is that correct?

A. That is about the date. It appears to be about right; yes.

Q. Was the Government requirement for fineness, specification for fineness prior to that time more severe than the industry requirements?

A. They would have been had not agreement
48450 been reached; that is, the Federal group put into their specification that effective January 1 of a certain year—I presume about 1917, or possibly 1918—that the Government fineness would be increased.

Q. And was there anything in the nature of a compromise reached?

A. Yes, a compromise was reached and that was withdrawn.

Q. With the result that the fineness requirements agreed to were less severe than the Government had—

A. Had intended, yes.

Q. —had intended?

A. As measured by the sieve, yes.

48452 JOHN P. SIMPSON was thereupon recalled as a witness for the Commission, and, having been previously sworn, testified further as follows:

Direct Examination by Mr. Wooden.

Q. Mr. Simpson, as a rate expert, and one familiar with the methods and practices of railroads, what is the duty of the railroad in the event that a shipment is tendered to it for transportation to a certain destination, but where no rate or route is specified by the shipper?

48453 A. There are two conflicting principles of law in regard to this. The first is that the carrier is entitled to the benefit—I mean, the shipper is entitled to the benefit of the lowest rate. The second is that the shipper, once having tendered a shipment, is entitled to receive a haul on that shipment. The decision of the Interstate Commerce Commission in numerous cases, and always upheld by the Supreme Court, is that the carrier must transport the shipment over the cheapest route on which that carrier receives the initial haul.

In other words, if I may illustrate: On a shipment from New York to Washington, there are two carriers, or two routes serving those two cities. If a shipment is tendered to one of those carriers, and a lower rate exists on the other carrier, with the initial carriage, it is not the duty of the higher-priced carrier to tender the shipment to the lower-priced carrier.

By Mr. Wooden:

Q. But if there is any choice of routes or rates
48454 other than the one that you have just described, then what?

A. To take an example, which will illustrate the answer better than I can put it in words, if a shipment is made from Washington, D. C., to San Francisco, Calif., over the Baltimore & Ohio Railroad, it is the duty of the Baltimore & Ohio Railroad to transport that shipment to either Cincinnati—to either St. Louis, I should say—strike "Cincinnati"—or to Chicago, whichever route is cheapest, and then to tender it at that termini to whichever connection gives the cheapest through rate on that particular shipment.

Trial Examiner Norwood: That is, in case the routing is not placed on the bill of lading?

The Witness: That is the case when neither the route nor the rate is shown on the bill of lading.

Trial Examiner Norwood: If the routing is placed on the bill of lading then the railroad is discharged
48455 from responsibility as to selecting the—

The Witness: If that route is open.

Trial Examiner Norwood: Yes.

48456 By Mr. Wooden:

Q. Do you know, as a rate expert, Mr. Simpson, as to the relation between the level of water rates as compared with all-rail rates of common carriers?

A. Perhaps, for the sake of the record, I base it on the remarks yesterday exchanged between Counsel. I might explain that there are four types of water transportation—

48457 A. I think this explanation will simplify my answer:

The first is common carrier water transportation in connection with rail transportation.

A. (Continuing) The second is common carrier water transportation not in connection with rail transportation.

The third is that of charter service; and the fourth is that of private ownership service.

I am familiar only with the comparison of the
48458 first of those services which I have named, that of common carrier water service in connection with rail service, as compared with all-rail service. My contact with the other forms is so far back I would rather not express an opinion.

For many years, to my personal knowledge, water transportation in connection with rail transportation has almost invariably enjoyed a lower rate than all-rail transportation between the same points if, and only if, the distance via the combined rail-and-water routes was not materially greater than that of the all-rail route, and if, and only if, the cost of transfer is not out of proportion.

By Mr. Wooden:

Q. Are you confining yourself in that answer to a comparison of all-rail with rail and water?

A. With rail and water in connection with a through movement.

48462 Q. Now, Mr. Simpson, confining your attention for the moment to your experience in a comparison

of all-rail rates with all-water rates between given points, what has been your experience as to the relative levels of those rates?

Mr. Leisure: I may be mistaken, but I think the witness just told us as to that. He does not know. I object to that question on the state of the record.

By Mr. Wooden:

Q. Have you compared the all-rail rates with the all-water rates?

A. The day before yesterday—

Trial Examiner Norwood: Just answer the question.

A. The day before yesterday you asked me if
48463 I would make a comparison of a few such rates, and I did, and found that there was no change in the previous situation, and I am prepared to quote those rates, if you care to have them.

48467 Q. Mr. Simpson, if the shipper includes the rate on the bill of lading, does he need to specify the route, then?

A. If the shipper shows a rate of a given number of cents, and there is in connection with that carrier
48468 to which the shipment is tendered, as an initial line, a rate of that amount on one or more routes, it is the duty of the carrier to transport the shipment via one—by one of those routes.

Q. What happens, Mr. Simpson, if there is not a rate?

A. If the shipper tenders a bill of lading and a shipment and the bill of lading bears a rate which the agent cannot check, it is his duty, as he finds in several decisions of the Commission, to notify the shipper that he is unable to check that rate by any route, and to ask for further instructions.

Q. Are you presently employed by the Interstate Commerce Commission, Mr. Simpson?

A. I am sir.

48470 WILLIAM M. KINNEY, called as a witness for the Commission, being first duly sworn, testified:

Direct Examination by Mr. MacIntyre:

I am vice president and general manager of the Portland Cement Association and have held that position since 1918. Since I have been in that position I have given

testimony in a proceeding against the cement manufacturers. I have forgotten the name of the case but I think it is the Cement Manufacturers' Protective Association.

48471 The witness identified Com. Ex. 3358-A to L inclusive as a record of part of the testimony which he gave in the case in which he appeared as a witness in 1922. That is the testimony appearing on pages marked for identification as Com. Ex. 3358-A down to the ink-and-pencil marked lines on page 3358-L. He stated in

48472 his testimony at that time to the best of his knowledge and belief.

The witness identified Com. Ex. 3194 as ap-

48473 pearing to be a reproduction of a letter which he wrote to Mr. Naylor of the Knickerbocker Portland

48474 Cement Company; Com. Ex. 3195 as seeming to be a copy of a letter which he wrote to Mr. Naylor of the same company; Com. Ex. 3359 as a reproduction of the original call of a meeting of cement manufacturers. He recognizes the letter (Com. Ex. 3195) as having accompanied the reproduction (Com. Ex. 3359) as a matter of historical interest.

48475 The witness identified Com. Ex. 3360 as a list of the member companies of the Portland Cement Association as of July 1, 1932; Com. Ex. 3361 as a list of the member companies of the Portland Cement Association as of July 1, 1937; Com. Ex. 3362 as a copy of the proceedings of the annual meeting of the Portland Cement Association held November 17 to 19, 1930. He produced

48476 the last three exhibits (Com. Exs. 3360 to 3362) today in response to a subpoena duces tecum. The subpoena duces tecum called for his production of one additional document in addition to the material already presented, to wit, the minutes of the committee on cement specifications relating to a meeting held on November 18, 1930. He did not produce those minutes for there were no such minutes kept. The committee had a meeting

48477 but no minutes were kept. It was not customary to have them and never has been. He recognizes the signature to that letter (Com. Ex. 3237-H) as the signature of Mr. J. W. Johnson, assistant general manager of his Association at that time. Those minutes that Mr. Johnson acknowledged there as having been returned

48478 to him by Mr. J. Wallace Kemp were minutes kept by his Association as records of its meetings. The

witness did not have anything to do with the Association as of the dates of these minutes. They were found in the offices when he was there and he kept them as records of the Association. They happened to be as of the dates of the Association of American Portland Cement Manufacturers which was the organization which was later given the name Portland Cement Association and he kept them
48479 as records of the organization and of its meetings.

Mr. MacIntyre: Now, if Your Honor please, I offer into evidence—

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. MacIntyre: I now offer, if Your Honor please, into evidence Commission's Exhibit, for identification, 3358-A to L, inclusive, being testimony which Mr. Kinney here gave in the case of the *United States* v. *The Atlas Portland Cement Company, et al.*, before a jury, which was later stipulated over into the case of the *United States* v. *The Cement Manufacturers Protective Association, et al.* Mr. Kinney has just identified this as his testimony given there and vouched for it as stating the facts as he knew them as of that time. I offer it as an exhibit here in an effort to save time and as admissions made at that time made by a representative of an organization which at that time, as well as of July 1, 1937, represented practically all of the Respondents in this case.

Mr. Werle: The admission of a third party.

48480 Mr. Zimmerman: That is the P.C.A., I take it?

Mr. MacIntyre: No, as representative of the complainants in this case.

Mr. Leisure: Have you completed your offer, Mr. MacIntyre?

Trial Examiner Norwood: Complete your offer.

Mr. MacIntyre: And I further state as a foundation for that offer that it shows who were members as of dates of the operation of a Trade Relations Committee of that Association, who were members of the Association as of that day, and that, taken with the evidence already in the record, rebuts directly and as squarely as could be the defense of the Respondents throughout the past year and a half to the effect that first one and then another of practices in the cement industry grew out of custom rather than by concert and agreement within the cement industry.

Mr. Leisure: Do you mean all that is shown in this testimony that you are just tendering here, marked exhibit—

Trial Examiner Norwood: 3358-A to L.

Mr. Leisure: —3358, Mr. MacIntyre?

Mr. MacIntyre: I do not state that all of that is shown there, but when you take what is shown there plus what the record now contains, it shows that these Respondents did the things which the record shows, and it is in
48481 rebuttal to what you have attempted to show on defense.

Examination on Voir Dire by Mr. Leisure.

48482 Q. Mr. Kinney, let me start over again:

You testified in a case brought against a company called the Atlas Portland Cement Company back in 1920?

Mr. MacIntyre: April 22, 1922, Mr. Leisure.

By Mr. Leisure:

Q. 1922. And by whom were you employed at the time you testified?

A. By the Portland Cement Association.

Q. And as the representative of the Portland Cement Association you were testifying when this testimony was given?

A. Yes.

48483 Q. Is that correct?

A. Yes.

Mr. Leisure: Well, now, Your Honor, without going any further on any other questions, here is testimony being offered to bind the Respondents in this case, taken bodily out of another proceeding by a representative of an organization that is not a party to this proceeding, and unless some foundation is laid, and as far as I know none could be laid, anything that this witness might have testified to could not be binding on any other Respondents here, and the only theory of law that I know of, and if there is any other I would like for Mr. MacIntyre to inform the Examiner because I do not know of it, I know of no other theory being offered other than as an admission.

48485 By Mr. MacIntyre:

Q. Mr. Kinney, will you please if necessary to, refer to Commission's Exhibit, for identification, 3358-A to L, and tell us who were members of the Portland Cement Association during 1931, just prior to your testimony in

this Cement Manufacturers Protective Association case and as of the period 1915?

48486 The Witness: I think the question should be cleared up because you are now asking me to cover two periods, one in which I was an employee of the Association, another in which I was not an employee of the Association. You made some reference to the Trade Practice Committee. It was not in existence during any part of my employment, so I have got to get the question clear so I will know what you are talking about.

By Mr. MacIntyre:

Q. Were you with the Portland Cement Association prior to January, 1919?

A. One month prior to January, 1919.

Q. Is it your testimony, Mr. Kinney, that no Trade Relations Committee or Trade Practice Committee of the Portland Cement Association operated during 1919 and made recommendations?

A. I said not during my period of administration, that is my recollection. I would have to refer to the record, but that is very definitely my recollection.

Q. What position did you hold with the Portland Cement Association in 1919?

A. General manager.

48487 Q. Do you testify now that no trade relations committee operated during 1919?

A. That is my recollection.

48488 Q. During 1919.

A. That is my recollection; at least I might attend that to say that it at least was not active. I am a little hazy on that period, but I do not recall any activities of any trade relations committee from the standpoint of being general manager in that period.

Mr. MacIntyre: If Your Honor please, referring again to Commission's Exhibit 3358-A to L, I offer this in evidence as a Commission's exhibit on the theory that it is a statement of admissions of a representative of Respondents in this case that was made prior to the proceeding in this case.

Mr. Zimmerman: May I ask what Respondents?

Trial Examiner Norwood: You cannot give in his admission if he is here on the stand.

Mr. MacIntyre: Respondents' representative, cannot—the admission cannot be offered by us if he is here; is that the ruling?

Trial Examiner Norwood: I think so. It only becomes competent in his absence, because an admission—he
48489 can tell us.

Trial Examiner Norwood: Now, he is on the stand and you may bring all of that out, and I know of no way that it can be done—if the Counsel for the Respondents will permit it, this can go in and we would not take
48490 very much time with it, but as they do object you will have to bring it out.

48492 By Mr. MacIntyre:

Q. Mr. Kinney, I think that you have already identified Commission's Exhibit 3359.

A. Yes.

Mr. MacIntyre: I now offer in evidence, if Your Honor please, Commission's Exhibit 3359.

48493 Mr. Leisure: Are you offering all of these, Mr. MacIntyre?

Mr. MacIntyre: I am offering one, Commission's Exhibit 3359, just one page. The other two are already in evidence, the letter of which that was an enclosure is in evidence.

Examination on Voir Dire by Mr. Leisure.

Q. 3359, when Mr. MacIntyre examined you a few moments ago, as I recall, Mr. Kinney, you told him that was a call sent out; is that the way you used the word?

A. It is a reproduction of the original call.

Q. A call sent out by whom?

A. I would not know. It is not signed.

Q. You don't even know who sent the call out?

A. No, it is merely an historical document, as I take it; I did not see that it is signed.

Q. You did not write it, did you?

A. I do not presume that is the signature; I do not know. No, this is away beyond—this is 1902. I was not even in the business then.

Q. So when you said it was a call sent out you just looked at the document and repeated what you saw
48494 on the face of the document?

A. That is right.

Q. As far as any knowledge goes?

A. That is right.

Q. As to Commission's Exhibit, now in evidence, 3194, dated December, 1919, signed by you, by whom were you employed when you wrote that letter, Mr. Kinney?

A. By the Portland Cement Association.

Q. Did you have any connection whatever with The Cement Institute—were you employed by them or authorized to speak for them in any way?

A. No.

Q. Do you know whether or not any of the members who were members of the Portland Cement Association at the time you signed that letter have now gone out of business?

A. Oh, yes, lots of them.

Q. And do you know whether or not many of the members of The Cement Institute are now new corporations which have been formed since the date of that letter?

A. Well, I do not know that I have ever seen a
48495 list of The Cement Institute, so I do not believe I could answer that question. I know as far as the Portland Cement Association, there have been a number go out of business, and I presume some of the others—I mean, members of the other organizations, because many of them belong to both, but I have never seen a list as such of The Cement Institute.

By Mr. Leisure:

Q. And as to this other exhibit, Commission's Exhibit 3195—

Q. —by whom were you employed at the time that document was written?

A. By the Portland Cement Association.

Q. And that was also back in 1920?

A. 1920, yes.

Q. And were you employed by The Cement Institute, or authorized to speak for them in any way?

A. No, sir.

48497 (The document heretofore marked for identification "Respondents' Exhibit 3359.")

48499 By Mr. MacIntyre:

Q. Mr. Kinney, did you at any time have, as an officer of the Portland Cement Association, a man by the name of E. J. Mehren?

A. Yes.

Q. What position did he hold?

A. President.

Q. Over what period of time?

A. I don't remember exactly the dates of his encumbency.

Q. Well, approximately.

A. About 3 years, I would say—somewhere around, maybe, the end of 1931 to about 1935—somewhere in there. I don't know just the exact dates.

Q. He was holding that office during 1935, was he not?

A. I am not sure just when the change took place. I think he was, in 1935; yes.

Mr. MacIntyre: If Your Honor please, I now offer into evidence Commission's exhibit which has heretofore been marked for identification as 415-542. It is an
48500 exhibit out of a file of papers that Mr. Leisure presented under subpoena duces tecum from the files of The Cement Institute. It is a photostat of that document. The original has been returned to Mr. Leisure.

48501 *Examination on Voir Dire by Mr. Leisure.*

Q. Mr. Kinney, this exhibit that Mr. MacIntyre has just been referring to purports to be a photostatic copy of a telegram from a Mr. E. J. Mehren to Mr. George Reiter. Were you present when the telegram was sent by Mr. E. J. Mehren?

A. I have not seen the telegram. I don't imagine I was.

(Mr. Leisure handed the document to the witness.)

Trial Examiner Norwood: Do you know anything about it?

By Mr. Leisure:

Q. Did you see Mr. Mehren send that telegram?

A. No.

Q. Did you see Mr. Reiter receive it?

48502 Trial Examiner Norwood: What do you know about it?

The Witness: Well, it is a surprise to me, because—

Trial Examiner Norwood: Has it ever been called to your attention?

The Witness: I believe I am surprised at—

By Mr. Leisure:

Q. Can you identify it in any way?

A. No.

Q. Did you have anything to do with the telegram at the time it was sent or received?

A. No.

48503 (COM. EX. 415-542 was offered and received in evidence.)

49504 *Cross-Examination by Mr. Leisure.*

Q. Mr. Kinney, Mr. MacIntyre asked you about certain minutes of an organization which were taken—correct me if I am wrong about this; I am merely trying to recall from memory what the testimony was—minutes of an organization which were taken prior to the time that you came with the organization. Do you recall that?

A. I don't know—well, I know what you mean. I remember now—the minutes that were returned by Counsel in the Cement Case.

Q. That is right.

A. Yes.

Q. Now, is it or is it not a fact, Mr. Kinney, that those minutes were taken prior to the time that you became manager of the organization?

A. Yes.

Q. So that when Mr. MacIntyre asked you if you kept those minutes, did you mean that you kept them in any sense that you were performing any duty of the organization in keeping minutes or that you had simply not thrown them out? Which did you mean?

A. I don't know that there is any distinction there. The minutes are there. They have been kept there prior to my coming; and I just continued to keep them.

48505 Q. But Mr. MacIntyre used the phrase "you kept them" and I am trying to bring out exactly what the facts are as to what you did do. The fact is, is it not, that there were minutes in the office which you simply had not disposed of?

A. We have a library in which we keep all historical documents.

48506 Q. Now, on this Exhibit 3359, which was shown to you by Mr. MacIntyre, the first name appearing there is E. M. Young. Can you tell me whether Mr. Young is still alive?

A. No, sir; he is deceased.
Q. The next one is W. H. Harding.
A. He is deceased.
Q. What is the name of that company?
A. Bonneville Portland Cement Company.
Q. Is that company in existence today, do you know?
A. No.
Q. You do not know, or it is not?
A. It is not in existence.
Q. The next? Could you read that?
A. That is A. E. Gertell.
Q. Is he alive today?
A. No.
Q. And this one (indicating)?
48507 A. Northampton Portland Cement. I think that is DeNavaro. I presume that is what it is. You can't read it.
Q. Is he still living?
A. No. There is no such company as that.
Q. What is the company?
A. Northampton Portland Cement Company.
Q. Is that in existence today?
A. No.
Q. The next name?
A. Thomas J. Brady.
Q. Is he alive today, do you know?
A. I presume he is dead. I have not heard of him for many, many years.
Q. What is that next name?
A. Phoenix Cement Company.
Q. Is that company in existence today?
A. No.
Q. The representative of that company signed what name there?
A. It looks like William Turner. I never knew him. I don't know what happened to him. I presume he is dead.
Q. What is the next company?
A. Catskill Cement Company.
Q. Is that company in existence today.
A. No.
48508 Q. The representative of that company was whom?
A. J. W. Kittrell.

Q. Is he alive today?
A. I wouldn't say. I think he is dead, though.
Q. The next one?
A. Dexter Portland Cement Company is the next—no longer in existence.
Q. And the representative of that company was whom?
A. George E. Bartol.
Q. Is he alive, do you know?
A. I think he is dead.
Q. And the next one?
A. The Glens Falls Portland Cement Company.
Q. Who was the representative there?
A. W. W. McClay.
Q. Is he dead or alive?
A. I think he is dead.
Q. The next company is Cuyago?
A. Cuyago Lake Cement Company.
Q. Is that company in existence today?
A. No.
Q. And who was the representative of that company?
A. It looks like M. E. Caulkins.
Q. Did you know Mr. Caulkins?
A. No.
48509 Q. And the next?
A. Helderberg Cement Company.
Q. Is that company in existence today?
A. No, sir. Henry Dummay. He is dead.
Q. He was the representative of what company?
A. Helderberg Cement Company.
Q. What is the next company?
A. Martin's Creek Portland Cement Company.
Q. Is that company in existence today?
A. No.
Q. Who was representing that company?
A. That is a name I don't know.
Q. You are not acquainted with that?
A. No.
Q. The next?
A. Sinclair & Babson. I don't know what they were. Mr. Sinclair is in the cement business, and I don't know what?
Q. Did you know Mr. Ernest R. Ackerman?
A. Yes.

Q. Is he alive today?
A. No; deceased.
Q. He was representing the Lawrence Cement Company, according to that?
A. That is right.
Q. Did you know Mr. A. W. — how is that spelled?
48510 A. Young, Jr.—A. W. Young, Jr., I guess it is. No, I don't know him.
This is DeNavaro. I guess that was another man. I don't know who that was. That must have been a man named, where we have DeNavaro, apparently it was Drumm.
Q. Did you know Mr. Drumm?
A. No, I did not.
Q. Did you know Mr. DeNavaro?
A. Just met him once.
Q. Is he alive today?
A. He is dead.
Q. What is the next name?
A. W. C. Kent. I didn't know him.
Q. You did not know him?
A. No.
Q. The Eastern Portland Cement Company?
A. That is Edison Portland Cement Company.
Q. Edison Portland Cement Company. Did you know Mr. Pickering? Is that Pickering?
A. Pickering, I think it was. I think he is dead. I didn't know him.
Q. And Empire Portland Cement Company. Is that company in existence today?
A. No.
Q. And the signature there is—
48511 A. Charles A. Lockhart. I didn't know him.
Q. The next?
A. Wayland Portland Cement Company.
Q. Is that cement company in existence today?
A. No.
Q. It was represented by—
A. B. F. Whitmore. I didn't know him.
The last is T. Millan & Company. That is out of existence.
Q. That is out of existence, too?
A. Yes.

48513 By Mr. Zimmerman:

Q. Mr. Kinney, you produced the lists which, as I understood you, you described as member companies as of July 1, 1932, and which has been marked as Commission's Exhibit 3360, but which has not been offered in evidence.

Mr. Zimmerman: Has it, Mr. MacIntyre? I notice it is not marked for identification only, but it is marked as an exhibit.

By Mr. Zimmerman:

Q. I ask you, Mr. Kinney, does that merely represent those whose dues were paid as of that time?

A. Yes; that is what it would have stated.

Q. It does not mean that they were actual mem-

48514 bers as of that time?

A. That is correct. It is a record of when these companies started paying dues.

Q. That is to say, they might have joined some time later, and if they began paying dues on July 1st, that is all this list would show?

A. That is right. We sometimes had them pay back a month or two.

A. Yes, but if their dues are paid back to beginning somewhere in the period, then the list is made as of that time?

A. Yes, that is right.

Mr. Zimmerman: Thank you. That is all.

Redirect Examination by Mr. MacIntyre.

Q. Mr. Kinney, on cross-examination Mr. Leisure asked you about the names of the manufacturing companies appearing on Commission's Exhibit 3359. I will ask you now whether or not the Alpha Portland Cement Company listed there is a member of your Association.

A. Yes.

Q. The Coplay Cement Manufacturing Company?

A. No.

Q. It is not a member?

A. No.

Q. Nazareth Cement Company?

48515 A. Yes.

Q. The Edison Company?

A. No.

Q. The Lawrence Company?

A. I don't think the Lawrence Cement Company is a member. I think the Lawrence Portland Cement Company is a member.

Q. That is the one that is affiliated with the Lawrence Cement Company; that is the Ackerman Company; they are in the management of both of them?

A. I think the Lawrence Cement Company was a sales company and the Lawrence Portland Cement Company was a manufacturing company, and the manufacturing company is a member of the Portland Cement Association.

Q. And what about the Whitehall Company?

A. They are not members. I wish they were. Several others you mentioned ought to be.

Q. What about the Vulcanite Company?

A. Vulcanite is not a member.

Q. What about the Lehigh Portland Cement Company?

A. They are members.

Q. Well, I am inquiring as to past times. Did you say that those that I asked you about have not been members of the Portland Cement Association?

A. Yes; some of them have not.

48516 The Witness: The Whitehall was a member and it now is not. The same is true of the Coplay and of the Edison Company.

By Mr. MacIntyre:

Q. But the Lehigh has been a member and still is?

A. And I hope will be.

Q. And the Vulcanite has been?

A. They have been, years ago. They haven't got enough money to pay the dues now.

Q. You stated that you attended some meetings of the Portland Cement Association at the time that it was known as the Portland Cement Association and also at the time that it was known as the Association of American Portland Cement Manufacturers. Prior to the time that you became the manager of it whom did you represent in those meetings?

A. Universal Portland Cement Company.

Q. In the minutes of those meetings that you attended, which you later kept when you were manager of the Portland Cement Association, did you notice anything in those minutes that was contrary to what you recall as having taken place at the time you were in attendance as repre-

sentation of the Universal Portland Cement Company?

48517 A. I think I should have answered the question before a little differently. I was merely in attendance at these meetings; I was not an officer of sufficient importance to represent the company; that is, I had no voting right or anything of that kind. A number of us went to meetings, but with respect to the minutes of that period I never have read them back to see what was said. I was interested primarily in the technical phases of the meetings, and the minutes had no particular significance other than the technical matters, and I do not know that I ever went back into the records to see what they were.

By Mr. MacIntyre:

Q. What position did you hold with the Universal Portland Cement Company at the time you attended these meetings?

A. I forget what the title was—inspecting engineer and engineer of the information bureau.

48518 Q. Did you know other representatives of the Universal Portland Cement Company who attended those meetings with you?

A. Yes.

Q. Who were they?

Mr. Leisure: I object to that, Your Honor. This company is not a respondent in this case. I do not know why we should spend time going into that.

Trial Examiner Norwood: Objection overruled.

A. Men like Mr. Hager and Mr. Affleck and Mr. Smith. I don't know who else.

By Mr. MacIntyre:

Q. What positions did Mr. Affleck and Mr. Hager hold with the Universal Portland Cement Company at the time they attended these meetings with you?

A. Mr. Hager was president and Mr. Affleck was sales manager.

Q. Mr. Zimmerman, on cross-examination, asked you about the matter of some members of your Association joining the Portland Cement Association subsequent to July 1, 1932, and with their dues going back to that period. I now call your attention to Commission's Exhibit 3005-A to F, inclusive, which purports to be a set of minutes of the Portland Cement Association board of directors of July 11 and July 12, 1932, over your name. Will you state whether or not you recognize those as the minutes,—as a photo-

static copy of the minutes,—of that meeting of the board of directors of that Association?

48519 A. These have every evidence of being the minutes; yes.

By Mr. MacIntyre:

Q. Now, I call your attention to paragraph fourth from the bottom of Commission's Exhibit 3005-E, and ask you to state, referring to that, if necessary to refresh your recollection and memory, as closely as you can, the

48520 dates on which the Marquette Company, the Dewey Company, the Hawkeye Company, and the Missouri Company filed application for renewal of membership in the Portland Cement Association?

A. I could not answer it from this record.

By Mr. MacIntyre:

Q. Well, would you say that it was prior to July 11 and 12, 1932?

A. That they had made their application?

Q. For renewal of their membership.

A. I would say no.

Q. Well, would you say that there had been any action taken by the Portland Cement Association appprov-

48521 ing the renewal of their membership as of that date?

A. No. The only thing that this record shows is that several of them indicated that they would. Now, the actual date when they did it, I don't know.

Q. But they had not—

A. They did pay dues back to July 1st, but I don't know just when their applications came in, but we took them on faith and assumed that they would carry out what they told us they would do.

Q. What can you state concerning the dates on which those four companies about which we have been talking indicated their willingness to rejoin the Portland Cement Association?

A. I presume it was some time in July, or thereabouts.

Q. Prior to July 11 or 12, 1932?

A. I would not assume—you mean their applications or their statements?

Q. Their indications that they would rejoin.

A. I assume it must have been before this meeting. Otherwise, it would not have been a matter of record here.

Mr. MacIntyre: That is all.

Mr. Zimmerman: I have another exhibit of the same character that I should have asked about, but I did not.

This is the one marked, but which I understand has not been offered or received in evidence, Commission's Exhibit 3361, which is headed "Member Companies as of
48522 July 1, 1937."

Recross Examination by Mr. Zimmerman.

Q. That list purports only to indicate the date as on which the concerns named thereon began paying dues; does it not?

A. Yes, sir.

Q. That is to say, it does not indicate when they joined or that they were actually members on July 1, 1937?

A. Yes; that is correct.

Trial Examiner Norwood: That is not in evidence.

Mr. Zimmerman: They may not have been offered but they were identified, and I assumed that they properly would be offered. I don't know; maybe I am wrong.

Mr. MacIntyre: It so happens that we have a series of lists of membership of this Association in for the years between 1930 and 1937; so we are not offering these.

Mr. Zimmerman: Then, let me ask you this general question:

By Mr. Zimmerman:

Q. The records, so far as you know, would not indicate the exact date, that is, without the production of the applications for membership, when any application for membership was made; would it?

A. No.

48526 (COM. EX. 3363, was offered and received in evidence.)

48527 (COM. EX. 2220-A-F, was offered and received in evidence.)

DR. CLARE E. GRIFFIN was thereupon recalled as a witness for the Respondents, and testified further as follows:

48541 Mr. Bond: If Your Honor please, I offer to prove that in response to the following question, to-wit: "Assuming the marketing method in this industry to be as described in what we have throughout the case
48542 referred to as my long hypothetical question, and assuming further that at each destination the quotations to the trade by the various producers are identical

at any one time; upon what economic theory would you explain such identity of quotations?"

That the witness would testify substantially as follows:

"I would explain it on the ground that when mills which were relatively distant from a given market considered quoting a price for a product delivered in that market, they would take into account the lowest price that was regularly being quoted by other and perhaps more advantageously located mills. They would naturally quote that price or, if it were too low to suit them, they would not quote at all. They would know that with a homogeneous product offered to informed buyers the quotation would have to be as low as the lowest quotation made in order for it to be effective. Thus all quotations would be equal to that of the lowest and hence equal to each other and hence identical. In other words, you would have the same result by the anticipation of business men as would have been attained had each of these mills made its original quotation independently and then found after the quotations were in that they either had to accept the lower quotation or not sell in the market. The only difference on
48543 this point, then, between the simplified theory and what actually happens is that the simplified theory assumed that the prospective or potential sellers actually went through the steps of making quotations and then found by experience what the lowest offered price was; whereas, actually, business men, when facing an existing price, know that that is the price that ultimately is going to result, and, therefore, they jump over those intervening steps, so to speak, and quote that price. The result is identical quotations in the first place, as well as identical prices in the last place, except momentarily at the time of the price change."

I further offer to prove that the witness, if permitted to testify, would, in answer to the following question, to-wit:

"Is there, in your opinion, then, any relation between identity of quotations at each destination point and the recognized economic rule of uniform price in the market at any one time?"

would have testified as follows:

Trial Examiner Norwood: How much have you got there?

Mr. Bond: It will take six or eight minutes.

Trial Examiner Norwood: Go ahead.

Mr. Bond: "Yes, decidedly. The relationship is that under the actual conditions of manufacturing indus-
48544 tries the price which is going to prevail can often be anticipated by business men and they therefore make their quotations in the light of that information; and, therefore, identity of price and identity of quotations both exist and are quite consistent, one with the other."

I further offer to prove that the witness would, if permitted to answer the following question, to-wit:

"Do you consider that, under the conditions assumed in this industry, it is necessary that there be any higgling over price as an essential condition of having a competitive price produced?"

would answer as follows:

"No. The higgling assumes that prospective sellers do not know what price is likely to prevail and is the means by which they do learn that fact. Now, if they know that in advance, through information supplied by their sales force or through prices that are existing and are commonly known in the market, then there is no occasion for the so-called higgling."

I further offer to prove that the witness would, if permitted to answer the following question, to-wit:

"Let me read the following to you, Professor:

"'The theory in general, of course, which is rather simplified sort of theory, is that producers coming into a market conceive rather in terms of the market place
48545 with sellers physically present, which was the one which was rather general at the time economic theory was first formulated. Now, as you extend that forward and have an industrial plant selling in several markets and with different costs of putting it into that market, I should say that the thought would be as an extension of the logic, of the general theory of uniform price and market, would mean that he would not expect under one set of circumstances to sell the product at a lower price than he would under another, that is, that he would not take from part of his market a lower price than he was taking from part of the other.'

"What kind of competition, using the terminology with which economists are accustomed to use, does this passage refer to?"

The witness would testify substantially as follows:

"I would think that the speaker was referring to conditions of perfect competition when he described the situation as it originally existed. Then he attempts to extend that theory on to conditions involving industrial plants. Now, in practice, industrial plants are operating under conditions of imperfect competition, so he is attempting to apply conclusions reached under assumptions of perfect competition to conditions of imperfect competition."

48546 I further offer to prove that if the witness were permitted to testify in answer to the following questions, to-wit:

"Under conditions of imperfect competition such as are found in this industry, would you, as an economist, expect the delivered price at each destination to reflect, in the long run, the costs of each producer including a reasonable rate of return on investment?"

He would testify as follows, substantially:

"It is apparent and probable that the costs of the various producers selling"—

Trial Examiner Norwood: Just summarize what you want to show by this witness.

Mr. Bond: That the witness would testify sub-

48547 stantially as follows: That obviously he would expect the costs of the various producers to be different, and since the price at each destination will be identical it is obvious that the price at such destination cannot reflect the costs of each producer selling there since those costs vary among themselves.

I further offer to prove through this witness that contrary to the testimony of Dr. Nourse appearing on page 48150, the witness, in his opinion as an economic expert, considers that a purchaser would expect delivered cost to him to be identical since knowing the facts and knowing the quotations and sales that are being made there is no reason why he would not expect them to be identical.

I further offer to show through this witness in answer to Dr. Nourse's testimony on page 48161, that in his opinin it is not correct to say that the amount of unemployment in the industry would be proportionate to the non-utilization of plant capacity, that there would be a general relation between increased output and increase in employment, but no exact relationship which would allow the measurement of unemployment to be by the amount of non-utilization.

I further offer to prove in answer to Dr. Nourse's testimony on page 48161 that whereas Dr. Nourse in his opinion considers that any departure from the competi-
48548 tive conditions assigned to medieval markets should be characterized as artificial; in the opinion of this witness such departures are not artificial but have grown up out of the nature of actual business, and a natural departure from assumed conditions of theoretical perfect competition, which in his judgment cannot be characterized as artificial.

Finally, I offer to prove through this witness in answer to the testimony of Dr. Nourse on page 48168, that whereas Dr. Nourse in his testimony, beginning with the words "The normal theory of procedure," considers that under a competitive condition the market price would be lowered whenever operation was below full capacity, in the opinion of this witness as an economic expert under the conditions of imperfect competition realizing the fact of an inelastic demand, knowing also that any price reduction on his part would be immediately met by his competitors, that these conditions would indicate to him that he would not benefit from such reduction, and, therefore, would lead him to refrain from such price reduction, and, therefore, the testimony of Dr. Nourse is not applicable to such question as that.

Mr. Wooden: Your Honor, I want to say that in my judgment more than half of this so-called offer of proof is nothing but a rehash of direct testimony given by
48549 this witness and other witnesses on behalf of Respondents, and that the whole of it is nothing but a rehash of arguments rather than the presentation of competent, recognized economic theory and opinion.

Trial Examiner Norwood: Well, I shall not hear anything further.

Mr. Bond: I point out the witness is here ready to testify.

Trial Examiner Norwood: Yes, the witness is here and the testimony is rejected, and the taking of the testimony is closed subject to the objections and ruling as to those last exhibits that were offered, and subject to corrections to the record.

48554 Washington, D. C.,
Tuesday, November 26, 1940.

48559 (COM. EXS. 3283-B, 3298, 3299, 3300, and 3301, were offered and received in evidence.)

48567 Mr. Wooden: At this time, Your Honor, we wish to move to strike certain testimony and exhibits from the record, in line with Your Honor's general ruling in other instances, to the effect that evidence relating to specific costs, profits, and losses was irrelevant. The exhibits to which this motion applies are Respondents' Exhibits 2201-A to Z-71, Respondents' Exhibit 2202-A and B, Respondents' Exhibit 2202-C and D, Respondents' Exhibit 2203, and Respondents' Exhibit 2204-A and B.

Transcript, page 8211, lines 4 to 15, inclusive.

48568 Transcript, page 8266, lines 2 and 3.

Transcript, page 26897, lines 11 and 12, beginning with "levels at" and ending with "way."

Transcript, page 26901, lines 1 to 10, inclusive.

Transcript, page 29559, lines 7 to and including page 29565, line 18.

Transcript, page 29575, line 4 to and including page 29581, line 25.

In connection with these last two references, I refer to the cross-examination on page 29666, lines 17 to 23, inclusive, and the Examiner's ruling on page 29915.

Continuing with the motion:

Transcript page 29667; line 22 to and including page 29669, line 1.

In that connection, I would move further for a ruling on my motion that appears on page 33883.

Continuing with the present motion:

Transcript, page 36970, line 9 to and including end of page 36971; and in that connection, I refer to pages 36972 and 37010.

48577 With reference to the stipulation entered on the record on behalf of the Northwestern Portland Cement Company, from the State of Washington, an error was discovered in the stipulation, resulting from the typist having omitted a line in copying the redraft of the final stipulation, and in paragraph 9 of that stipulation, which was entered in the record, the line beginning: "These com-

munications were not used in any way by it, inasmuch as comprehensive figures are received," et cetera.

Trial Examiner Norwood: Is that the quotation?

Mr. Wooden: Yes; that is the quotation.

Trial Examiner Norwood: The beginning of it.

Mr. Wooden: Yes. Beginning with "These com-
48578 munications," that complete statement should read as follows:

"These communications were not used in any way by it, in as much as comprehensive figures are received from the Federal Bureau of Mines. No statistics are furnished The Cement Institute by Northwestern concerning its operations, sales, or general policies."

Trial Examiner Norwood: Where does that stipulation appear in the record?

Mr. Wooden: I do not know where it appears in the record, but it came in on the last day of Respondents' case.

Trial Examiner Norwood: That reference will enable us to identify it?

Mr. Wooden: I think so. It was on November 12th, the last day of Respondents' testimony.

Trial Examiner Norwood: All right. Let the correction be made.

48605 Mr. Brick: On behalf of each of the respondents, I renew and again make all the motions to strike and to limit which we made at the close of the Commission's case in chief, excepting those with respect to which the Commission reversed the rulings of your Honor.

48606 At the time the motions to limit were originally made, your Honor denied them on the ground that a prima facie case of conspiracy had been established by the Commission, and that all of the evidence offered by the Commission was binding as against each of the respondents. We contend that no such case of conspiracy was established by the evidence of the Commission, and that, in any event the evidence of the Respondents clearly rebut any direct evidence or inference of conspiracy.

48613 Mr. Brick: On behalf of each of the respondents, I move that all figures representing the mill nets, price bases, so called base prices or mill prices, be stricken from the record, whether in testimony or in exhibit form, on the ground that such figures relate to the fairness or unfairness or the reasonableness or unreasonableness of earnings, costs and prices, all of which subjects have been

ruled out of the case as matters of defense. Since respondents were precluded from offering evidence on these subjects, it is submitted that such evidence offered by the Commission should be stricken, or, in the alternative, it should be limited so that the figures I mentioned may not be used by counsel for the Commission for the purpose of arguing or establishing any position relating to the subjects I have mentioned, and with respect to which we were not permitted to offer proof.

48614 Trial Examiner Norwood: I will reserve the ruling until we meet on Friday.

48646 Washington, D. C.,
Friday, November 29, 1940.

48647 Trial Examiner Norwood: Pursuant to the adjournment on November 26th, the hearing in Docket 3167 is now reconvened in Room 332, Office of the Federal Trade Commission, Washington, D. C., at 10 o'clock a.m., November 29, 1940.

Please note the appearances.

I will take up these deferred rulings, first.

In regard to Mr. Wooden's motion appearing on page 48567 of the record, to strike Respondents' Exhibits 2201-A to Z-71, 2202-A and B, 2202-C and D, 2203, and 2204-A and B, and the testimony on certain lines and pages there cited, the motion is allowed.

Mr. Withrow: Your Honor, are we to be given an opportunity to address remarks to these?

Trial Examiner Norwood: I do not think it is necessary. I made a careful study of this, and we discussed it pro and con many times. We are meeting here to correct the record, and if there is anything you want to argue before the Commission with respect to it, we will consider that you may have the advantage of anything there that you could here state.

Mr. Withrow: Would you specify what—

Trial Examiner Norwood: Now, if you will refer to my ruling on page 33889 of the record, that is the ruling
48648 that covers these. I am allowing these as coming under that.

48652 Trial Examiner Norwood: The motion appearing on page 48613 is denied.

48930 If E. W. McGovern were recalled and asked the following question, "Will you explain that answer a little further, Mr. McGovern.", he would testify as follows:

48931 "Well, the dealers in Nashville were trying to get more mark-up on their cement than they had in the past, and they were asking the manufacturers in any direct quotations made to protect that differential, and one of the dealers asked me if I would write to Marquette and ask them if they would protect that differential, and at his request I wrote the letter."

On further questioning E. W. McGovern would testify that he recalls his previous testimony and that to his best recollection the statement above is the answer which he originally made to the question on R. p. 36243, lines 24-25, when he was on the witness stand.

May 6, 1942.

Portion of Final Argument Before the Federal Trade Commission.

By Mr. Leisure:

The separate position of each of the companies which I represent is set out in our exceptions, and in our briefs. We rely on all the motions which we made in the course of the case and on our exceptions to the rulings of the Trial Examiner.

All these rulings appear in the transcript of the proceedings.

We also rely on our exceptions to the Trial Examiner's report. Here are our briefs and here are the exceptions.

I submit at this time for the consideration of the Commission the many exhibits of Respondents which were marked and excluded.

The following pages, numbered 15162 a, to 15162 ll, contain the evidence as designated by Superior Portland Cement Company, which was inadvertently omitted from printing in its proper place in the evidence.

The numbers at the side of the page refer to the pages in the original transcript of the evidence.

Redirect Examination of Gordon Tongue, witness for the Commission.

8464 The Witness: I don't recall, Mr. Wooden. I have not looked at the questionaires at all since it went out.

Mr. Wooden: Who did this trucking into Yakima that you are referring to?

A. Some of the dealers down there had the cement brought in.

Q. And you did not go along, as I understand, with the proposed increase, because you feared the trucking would prevent the increase sticking?

A. No, that if the price increase went in, that the other companies might not follow it and we would be out of the business, and we decided not to go up on our price.

Examiner Norwood: The trucking militated against the raise in price, did it not?

A. As far as we were concerned, yes, sir.

8465 By Mr. Wooden:

Q. Did you think that the proposed price increase might also increase the trucking into Yakima?

A. That would very likely follow.

Mr. Wooden: Nothing further.

Recross Examination by Mr. Leisure.

Q. The Examiner just asked you that you state your conclusion as to whether trucking militated against the raise in price, and you said, "As far as you were concerned." Would it have made the slightest difference to you whether it was by rail or by truck if the other companies did not follow your price when you raised it?

A. That is correct.

Q. Or by water or any other method?

A. That is correct.

Q. Was trucking by any means the criterion which caused you not to raise your price?

A. In this instance it was the trucking which had the effect on our not following the other price up.

Q. In response to one of my questions before you answered the Examiner's question, I asked you whether or not it was the trucking you feared or whether or not it was because you feared they would not follow in the price. Do you want to change that answer now and say that it
8466 was the trucking you feared rather than you feared they would not follow in price?

A. The reason we did not raise our price was because we felt if we did the truckers or those people buying cement by truck would not raise their price and we would be out of the business, and we decided that it was the best policy and the best practice to let our price stay where it was.

Mr. Leisure: That is all.

Recross Examination by Mr. Little.

Q. Mr. Tongue, what is the rail rate from Portland to Yakima?

A. 34¢ per hundred weight.

Q. And is that rail rate competitive with your rail rate from Concrete into Yakima?

A. I believe our rate is 28¢ per hundred weight.

Direct Examination of William P. Cameron, witness for the Commission.

8553 Q. Did you, after the settlement of the price war, make some move toward a working arrangement of some kind with the Northwestern Portland Cement Company?

A. No, sir.

Q. Showing you a paper marked Exhibit 1209-E for identification, is that a copy of a letter of yours dated December 16, 1931?

A. Yes, sir, that is something that was discussed amongst ourselves and never taken up with the Northwestern company.

Direct Examination of James A. Kell, witness for the Commission.

9223 Mr. Leisure: Is it true that this applies to not only companies outside of this section and Southern California companies? Is that contract, or that only
9224 the Southern California mills file?

The Witness: The four Southern California mills are the only ones that file contracts.

Cross-Examination of P. I. Taylor, witness for the Commission.

20731 By Mr. Clark:

Q. The Superior Portland Cement Company of Seattle, if I have stated the name correctly,—that is right, Superior Portland Cement, Inc., is the name. Do you know whether or not that company has bid, or do you recall whether or not it has bid in response to invitations from your department f.o.b. destination when bids f.o.b. mill only were called for?

A. No, I don't recall.

Cross-Examination of John P. Simpson, witness for the Commission.

20902 By Mr. Clark:

Q. In your previous testimony, Mr. Simpson, the testimony you gave on direct, I have you down as having stated, in substance, that 30 days' notice of a change of freight rates is required by the Interstate Commerce Commission.

A. If I made such a statement, that is not correct, strictly.

Q. What is the correct statement?

A. Thirty days' notice is required by the Interstate Commerce Act.

Q. All right.

It is also true, is it not, that on rates which are strictly intrastate, it is possible through the cooperation of
20903 the railroad and the local State authorities having such jurisdiction over such rates, to have changes made on very short notice?

A. That has no bearing on my question I answered as to the Act, and not as to the State Act.

Mr. Paulson: Your Honor—

By Mr. Clark:

Q. Whether it has any bearing or not, I wish you would answer the question.

A. The Interstate Commerce Act—

Trial Examiner Norwood: Wait a moment.

Mr. Paulson: I think, Your Honor, if either of these questions are to be allowed, a motion should be made to reinstate the testimony of Mr. Hugh E. White. This doesn't do anything but controvert his testimony.

Trial Examiner Norwood: Let the examination proceed.

Mr. Wooden: It doesn't do that.

Trial Examiner Norwood: Let the examination proceed, and then if that appears to be just, why, we shall—

Mr. Paulson: Thank you.

Trial Examiner Norwood: —we shall consider it.

Go ahead.

A. The Interstate Commerce Commission Act governs the transportation of freight or persons—property or persons—between points in different States, or between
20904 points in the same States, moving out of that State in-transit.

Q. Yes.

A. Or prior to or following the transit.

Q. Yes.

A. A rate from a point in Arizona to another point in Arizona confined to transportation within Arizona, would be subject to such laws, or constitutional provisions as might apply in the State of Arizona, and be subject to the regulation of the Arizona regulatory body,—

Q. All right.

Now, going back—

A. (Resumed) —and only under the Interstate Commerce Commission by virtue of section 13.

Q. That is right. All right.

Now, getting back to the question, Mr. Simpson, as to rates which are strictly intrastate. It is possible to have changes made on very short notice, is it not?

A. Both interstate and intrastate.

Q. All right. As short as three days on intrastate?

A. As short as one day on interstate.

Q. All right, but you do agree with me it may be done as far as intrastate?

A. I couldn't say definitely because I do not know, if you are speaking of Arizona.

Q. No, I am not; I do not happen to be at this time.

20995 A. But generally speaking, the state statutes are similar to the interstate statutes which permit one day's notice for cause shown.

Q. And, so far as you know, the statutes of the State of Washington are not contrary to that?

A. I have no knowledge in particular of Washington, but I have every reason to believe that they are generally the same.

Q. Well, now, as a rate expert, you undoubtedly know, Mr. Simpson, whether or not it is necessary to advise the Interstate Commerce Commission, or to secure its permission, to change an intrastate rate?

A. I know it is not necessary to secure permission.

Q. Well, in giving the history of the emergency freight rate increases on your direct testimony, you made the general statement that Ex Parte 115 became effective April 28, 1935,—do you recall that?

A. Yes.

Q. Do you know if any exceptions were granted excluding cement from the provisions of Ex Parte 115?

A. When I was first placed on the stand I made the statement that my testimony was confined to rates on file with the Interstate Commerce Commission, and that they were on movements between two points in the same State, certain rates or provisions which would be different from those which I have recited, but of 20996 which I had no notice, and which I did not pretend to be advised on.

Q. Well, the Ex Parte 115 related to what?

A. Ex Parte 115 was an order of the Interstate Commerce Commission authorizing the carriers to increase their rates by certain amounts.

Q. Well, now, was any exception granted excluding cement from the provisions of Ex Parte 115?

A. Yes, sir.

Q. There was, wasn't there?

A. Cement had to take up—oh, 115, yes, that was a maximum of one cent.

Q. That is right.

A. Yes.

Q. Ex Parte 115 did not apply to cement—

A. Ex Parte 15, did you say?

Q. Ex Parte 115.

A. Yes, sir; it covered cement for one cent a hundred pounds.

Q. But it was included in 115?

A. Yes, sir; November 15, 1937.

Q. Effective April 28, 1935,—it became effective then, did it not?

A. Well—

Q. Ex Parte 115?

A. Well, that was—there are two orders in 115, 20907 and perhaps we are not talking about the same order.

Q. Well, I am talking about the one that then became effective on April 28, 1935.

A. They had an increase of some—I think that was 7 percent of the transportation charges, but not in excess of one cent, but I couldn't swear to it without refreshing my recollection.

Q. Well, do you know Henry's Tariff No. 73-B?

A. What is the I. C. C. number?

Q. I. C. C. No. 410.

A. I have it with me.

Q. You have it with you?

A. Yes, (referring to data).

Q. That was issued April 10, 1935, was it not?

A. It was filed by the Commission April 10, 1935; yes, sir.

Q. It is effective on interstate business on April 18, 1935, and on intrastate business on May 13, 1935?

A. May I ask which State you are speaking of?

Q. The State of Washington.

A. I don't know when it was effective in the State of Washington; I have no—

Q. What do the effective dates on it show?

Mr. Wooden: Your Honor, I again say that this has no relation to the direct examination.

We certainly did not go into anything connected with the

State of Washington in any of these rates, or in any
20908 of these tariffs, that I know of.

Mr. Clark: I want to show that the charge in Ex Parte 115 was not applicable in carload lots of cement—

Trial Examiner Norwood: Wait a moment. What do you say to the objection?

Mr. Clark: I did not hear the objection.

Trial Examiner Norwood: Read the objection made by Mr. Wooden, please.

(Objection made by Mr. Wooden was read by Reporter.)

Mr. Clark: Well, if the Court please, the witness, himself, admitted just now on his direct examination—he gave the history of the emergency increases, and made the general statement that Ex Parte 115 became effective April 28, 1935, as I undestood his testimony.

Mr. Wooden: It was confined—

Mr. Clark: (Resuming) All I am seeking to show, is that Ex Parte 115 contained an exception excluding cement from its provisions so far as intrastate shipments are concerned—

Trial Examiner Norwood: He was referring to the witness—

Mr. Clark: So far as intrastate shipments are concerned.

Trial Examiner Norwood: His point is these questions
are not being directed to any topic covered by di-
20909 rect examination.

Mr. Clark: They are being directed to the contents of Ex Parte 115.

Trial Examiner Norwood: Was that referred to in the direct?

Mr. Wooden: I think it was.

Mr. Withrow: This was discussed for about two hours, Your Honor.

Mr. Wooden: I think it was, but we did not go into the question of intrastate rates at all.

Mr. Leisure: You did offer the exhibit in evidence, and they can argue from it anything that they want to, and here is an expert that is being asked for his interpretation.

Mr. Wooden: That just shows that if not proper cross-examination. You can put that in on your own case.

Mr. Clark: All I want—

Trial Examiner Norwood: It is impossible for me to keep all this witness' direct testimony in mind.

Mr. Clark: I can get at it quickly.

Trial Examiner Norwood: I think you can proceed with the understanding that if it is not connected up, or it appears to be outside of the range of the direct, that I will entertain a motion to strike it.

Mr. Clark: Right.

Trial Examiner Norwood: I have to trust the
20910 Counsel on both sides a great deal.

Mr. Wooden: Your Honor, the witness has testified a moment ago that his direct examination was not concerned with intrastate rates with relation to the emergency charges.

Trial Examiner Norwood: Yes.

Mr. Wooden: We are now getting into it on cross-examination.

Trial Examiner Norwood: Well, that—

Mr. MacIntyre: Your Honor please—

Trial Examiner Norwood: That particular point there may involve, or be necessarily involved in the matters that were completely covered on the direct.

Mr. Withrow: Your Honor please—

20911 Mr. Wooden: Not with this witness.

Mr. Withrow: Your Honor please—

Trial Examiner Norwood: Yes.

Mr. Withrow: —on direct examination this witness did point out, the first time he was on the witness stand, the necessity of considering whether or not rates became effective on intra-state shipments, and referred specifically to the emergency charges. On a subsequent time when he was on the witness stand, and testified, Mr. Wooden went into the subject of emergency increases, and their duration, effective dates, and so forth, in great detail.

Mr. Wooden: On interstate—

Mr. Withrow: It seems to me because of the witness' own testimony that it was necessary to look at the intrastate rates, that it becomes very material to point out the fact that this testimony did not cover intra-state rates.

Mr. Wooden: Your Honor pleases—

Mr. MacIntyre: Your Honor please—

Trial Examiner Norwood: Mr. MacIntyre.

Mr. MacIntyre: —in furtherance of the objection made

by Mr. Wooden, let us take cognizance of the statement made by Mr. Leisure to the effect that although this subject was not covered on the direct examination Mr.
20912 Wooden had in the record certain documentary evidence that did go into it.

Well, that is all that is necessary to refer to. If they attempt to do that, we can keep this witness on the stand many months.

Mr. Leisure: I did not say he did not go into it on direct examination. As a matter of fact, he did go into it on direct examination, but if he had not, if they offer exhibits in evidence and then put an expert on the stand, surely we can ask this expert to interprete those exhibits.

Mr. Wooden: You are going into other papers.

Trial Examiner Norwood: Did you finish, Mr. Wooden?

Mr. Wooden: It does not matter, Your Honor; nothing further.

Trial Examiner Norwood: All right.

The objection is overruled.

Go ahead.

By Mr. Clark:

Q. Will you answer the last question?

Trial Examiner Norwood: Yes.

A. In my previous testimony, in every answer, I restricted it mentally,—I think, generally, orally, to interstate traffic, for the simple reason that the intra-state issues are not filed except in rate instances, so anyone I
20913 mentioned a little earlier in my testimony with the Interstate Commerce Commission—

Q. The I. C. C.—

A. —I was referring to—

Q. —Henry's Tariff Number—

A. —referred to I. C. C. 410.

Q. Yes.

A. That bears the Washington Department of Public Works No. 405; a similar copy to this, printed off the same page, was filed with the Washington Department of Public Works, No. 405. There appears on page 2 of this schedule the following dates—

Mr. Wooden: Pardon me, what exhibit number are you referring to?

The Witness: Exhibit No.—

Mr. Clark: No, he is referring to Henry's Tariff number—

The Witness: I don't believe it has been introduced.

Mr. Wooden: Your Honor, it is apparent that the witness is reading from and using a paper that has not even been marked for identification.

I object to it.

Mr. Clark: We have no objection—

Trial Examiner Norwood: How did he begin that?

20914 Mr. Clark: I asked him if he had Henry's Tariff No. 73-B.

Trial Examiner Norwood: Yes.

Mr. Clark: If the Court please, he said he did have it,—or I asked him if he had heard of it, Henry's Tariff I. C. C. 410, and he said he had it.

Trial Examiner Norwood: Yes.

Mr. Clark: And that is what you hold in your hand now, is it not, Mr. Simpson?

The Witness: Yes.

Mr. Wooden: I object unless the paper be marked for identification.

Mr. Clark: We will have it marked for identification.

The Witness: I am sorry, this is an official copy.

Mr. Clark: May we have the understanding that we will have a photostatic copy marked for identification.

The Witness: I can mark this in pencil if the stenographer will give me a number.

(Thereupon the document referred to was marked in pencil Respondents' Exhibit 202, for identification.)

Trial Examiner Norwood: Off the record.

20915 (There was a discussion off the record.)

Trial Examiner Norwood: On the record.

A. Respondents' Exhibit 202, for identification, will be a tariff of emergency charges bearing various I. C. C. numbers, among them S. J. Henry's I. C. C. 410, Tariff No. 73-B which schedule was alleged to have been filed with the Washington Department of Public Works, their No. 405, which was issued April 10, 1935; the copy I have before me was filed with the Interstate Commerce Commission April 10, 1935, and was shown as effective April 18, 1935, except as noted on page 2. On page 2 there appears a notice, "Intrastate Traffic,"—

20916 Mr. Wooden: This is all descriptive of the paper, I take it?

Mr. Clark: No.

Mr. Wooden: And not taken from the contents.

Mr. Clark: The first part.

Mr. Wooden: He seems to be going into the contents.

Mr. Clark: Now we are getting into the contents.

Trial Examiner Norwood: You asked him about the rates?

Mr. Clark: Yes.

Trial Examiner Norwood: Let him use that paper to refresh his memory, refer to it as an expert, and tell you what the rates are.

Mr. Clark: Had your Honor finished?

Trial Examiner Norwood: Yes.

By Mr. Clark:

Q. Now, it was effective as to interstate business,—when was it effective?

A. T. E. R?

Q. T. E. R.

A. April 18, 1935.

Q. And as to intrastate business, when?

A. I don't know.

Q. Doesn't it show?

A. No, sir.

20917 Q. Well, now, have you the supplement B to Henry's tariff, 73-B?

A. No, sir.

Q. Perhaps we can save time in this way.

(Mr. Clark hands papers to Mr. Wooden.)

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: On the record.

Recess until 2 o'clock.

(Whereupon, at 12:05 o'clock p. m., a recess was taken until 2 o'clock p. m. of the same day.)

20918 Afternoon Session.

2 P. M.

Trial Examiner Norwood: Go ahead.

JOHN P. SIMPSON, thereupon resumed the stand and testified further as follows:

Cross-Examination (Continued) by Mr. Clark.

Q. At about the time we took recess, Mr. Simpson, I was getting ready to ask you a question which I shall ask you now: Do you know whether or not the surcharge imposed by Ex Parte 115 was applicable to cement carload lots on intrastate movement in the State of Washington?

A. Henry's 410 provided that the emergency charges named in that schedule on cement and everything else would not apply in any State—or in certain States, including Washington, until such time as lettered supplements were filed with the State commission. I do not know whether or not a lettered supplement was filed with the State Commission of Washington.

Q. What was the number of Henry's?

A. 73-B.

Q. Here is what is apparently a supplement to that.

Mr. Clark: May I have it marked for identification, if the Court please?

(The document referred to was thereupon marked for identification as Respondents' Exhibit 203.).

20919 By Mr. Clark:

Q. I hand you what purports to be, so far as its face is concerned, supplement B to Henry's 73-B, and ask you to examine it.

A. Yes, sir.

Q. You have examined it?

A. Yes, sir; but I—

Q. That supplement shows, does it not, that the emergency charge under Ex Parte 115 was not applicable to intrastate shipments in Washington?

Mr. Wooden: Your Honor, I object to the question. It is an effort to put into evidence, through the cross-

examination of this witness the contents of a written document and the contents of a document of which,—and the subject matter of which,—the witness was not asked about on direct examination.

Mr. Clark: Well, my recollection is, not about the document. I think Mr. Wooden is quite right. He was not asked about the document. He was asked about the application of Ex Parte 115.

Trial Examiner Norwood: This witness has given testimony on his direct examination as to rates, and he is a rate expert, and in giving this testimony he has referred to these official rates which are on file with the Interstate Commerce Commission, and which are public docu-

20920 ments.

Now, the proper objection might go as to the form of these questions, but that is just a difference in form only.

The Counsel may ask him the rates, and the witness may use these public documents to refresh his memory, or for purposes of identification as to what the rates are.

Mr. Paulson: If there is any relevancy, Your Honor.

Trial Examiner Norwood: Yes.

Mr. Paulson: If there is any relevancy.

Trial Examiner Norwood: If there is any relevancy.

Mr. MacIntyre: If Your Honor please, there is a further objection on this score; that is, the witness has been asked now to give the contents of a document which he has not yet been asked to identify, and a document which has not yet been identified. We do not know what it is Mr. Clark has not asked him what it is.

Mr. Clark: That is quite true.

By Mr. Clark:

Q. Do you know what it is?

Trial Examiner Norwood: I am not thoroughly satisfied with the way the paper has been used. I think Counsel may straighten that out.

By Mr. Clark:

Q. Are you acquainted with that document?

20921 A. I have never seen it before.

Q. Is it part of the files of the Interstate Commerce Commission?

A. No, sir; not required to be filed and would not be filed if tendered.

Q. It relates solely to intrastate rates?

A. Yes, sir.

Trial Examiner Norwood: Does that in any way serve to refresh your memory in respect to those rates?

The Witness: Not in respect to those rates it does not refresh my memory, because I never saw it before.

Trial Examiner Norwood: Well, I don't think you can use it.

20922 Q. Do you know what the fact is with regard to applicability or non-applicability?

A. I can explain the document by reading from its face; that is as far as I can go.

Trial Examiner Norwood: You must not do that. I shall sustain the objection.

By Mr. Clark:

Q. Your testimony was not clear to me whether or not the emergency rates applied to cement under ex parte 115 on intra-state shipments.

A. My testimony was predicated entirely on interstate movement and rates.

I stated in my original testimony—I can't give you the exact page, but perhaps Mr. Wooden can supply it for you—that I was testifying only from documents on file with the Interstate Commerce Commission because I had no knowledge whatsoever as to similar documents filed with the State Commissions.

Mr. Wooden: That emphasizes, Your Honor, that this is not cross-examination of this witness.

If they want to show any such fact, let it be done through another witness in connection with their presentation of their own side of the case.

Trial Examiner Norwood: They can call this witness and make him their own, when they are putting 20923 in their case.

Mr. Wooden: Oh, yes.

Trial Examiner Norwood: The point is well taken.

By Mr. Clark:

Q. Mr. Withrow has called my attention to something that may refresh your recollection.

I am referring to Respondents' Exhibit 203, for identification, and I call your attention to the language here: "Application of tariff of emergency charges on Washington intra-state traffic" and to this exception.

Now does that or does it not refresh your recollection as to the applicability or non-applicability of ex parte 115 on intra-state shipments?

Mr. Wooden: I thought he was going to read part of it.

Mr. Clark: No.

Trial Examiner Norwood: It is very clear that this is a paper—

Mr. Clark: On cement, that is (addressing the witness).

Trial Examiner Norwood: It is very clear that this is a paper that may not refresh his recollection. He doesn't know anything about it or what it is.

Mr. Clark: With deference, of course, I would take issue with Your Honor not on the witness' knowl-
20924 edge of this paper, but on the sources he may use in refreshing his recollection.

Trial Examiner Norwood: I should have added he stated he had no recollection whatsoever about it.

Mr. Clark: I am asking him now to see whether that is correct.

The Witness: I would like to say—

Mr. Withrow: He said he had no recollection of that paper.

Trial Examiner Norwood: Do you have any recollection that that refreshes in regard to that matter, Mr. Simpson?

The Witness: No, sir.

Mr. Clark: That ends that, then.

Trial Examiner Norwood: Yes. I didn't fully state my position, at first. Counsel was right in his remark.

The Witness: For the sake of the record, if I may be permitted to explain my previous examination, I made as thorough a check of the tariffs of the Interstate Commerce Commission as time permitted and a rather thorough check was made. I examined every schedule which appeared to bear on the situation, carefully, but I did not go outside of the files of the Interstate Commerce Com-
mission for any purpose in connection with this
20925 study.

Cross-Examination of Wendell Holmes, witness for the Commission.

21040 By Mr. Clark:

Q. During 1933 the Quartermaster General issued invitations for Fort Lewis in the State of Washington only f.o.b. Fort Lewis, didn't he?

A. I couldn't say—

Q. When I say "he", I mean that office.

A. I couldn't say. I wasn't employed by the

21041 Quartermaster General at that time.

Q. When did you go to the Quartermaster General's department or branch?

A. 1934, and I didn't start reviewing these particular invitations until a few months preceding my previous testimony.

Q. It is a fact during January and February, 1934, bids were asked by the Quartermaster General both f.o.b. shipping point and f.o.b. Fort Lewis?

A. I couldn't answer that question. In fact, clear up to this time the Quartermaster General does not invite bids.

Q. Who does, then?

A. The Quartermaster.

Q. All right. That was a mistake of mine.

It is correct, isn't it, from February 24, 1934, to September 18, 1936, the invitations issued by the Quartermaster called for bids only f.o.b. Fort Lewis?

A. I couldn't answer that question.

Q. It is a fact, isn't it, since May 10, 1937, to this present date, to day, the Quartermaster calls for bids both f.o.b. destination and shipping point in the State of Washington?

A. They are required; whether they comply with that, or not, it is necessary to refer to the invitations.

Q. Is your answer "no" then?

A. Not without referring to the specific invitations.

21042 Q. Well, it is true, isn't it, that neither the Superior Portland Cement, Inc., nor any other company in Western Washington has refused to bid f.o.b. mill on Army invitations, isn't that correct?

A. Would you state the question again, please?

Q. Well, isn't it correct that neither the Superior Portland Cement, Inc., nor any other company in Western Washington has refused to bid f.o.b. mill on Army invitations?

A. It would be necessary to refer to the abstracts.

Q. Well, you have received f.o.b. bids from the Superior Portland Cement, haven't you?

A. I recall one since my previous testimony.

Cross-Examination of Arthur Colegrove, witness for the Commission.

21100 Q. Then, of course, it follows necessarily that you did not intend your testimony to refer to or include or affect in any way these companies, or any of them, the Riverside Portland Cement Company, the Monolith Portland Cement Company, Southwestern Portland Cement Company, California Portland Cement Company, Santa Cruz Portland Cement Company, Pacific Portland Cement Company, Yosemite Portland Cement Company, Calaveras Portland Cement Company, Superior Cement, Inc., of Seattle, Beaver Portland Cement Company of Portland, Northwestern Portland Cement Company
21101 of Seattle?

A. I never heard of those companies.

Cross-Examination of William E. Haygbe, witness for the Commission.

21122 Q. And you didn't examine into the invitations or the bids for cement under the W. P. A. in central California?

A. No, sir; I did not.

Q. Nor in Spokane?

A. To the best of my knowledge, I did not.

Q. Nor in Seattle?

A. No, sir.

21123 Q. You have no knowledge of the practice of the mills with respect to sales direct of less than car load lots for W. P. A. jobs in Portland?

A. No, sir; I have no special knowledge.

Q. Nor in Seattle?

A. Not in Seattle.

Q. And you have no knowledge at all of the practice of the mills at Seattle or near Seattle with respect to sales to the W. P. A. in less than car load lots?

A. No, sir, I have not.

Cross-Examination of Major Herman Feldman, witness for the Commission.

21175 Q. So, so far as you can now say, it may be perfectly true that the California companies and the Pacific Coast companies actually bid f.o.b. mill when invited so to do; so far as you can say, at the present time?

A. That is quite possible.

21183 By Mr. Clark:

Q. Now you recognize this circular which is marked Respondents' Exhibit 219, for identification, do you not, as one that was issued over the signature of Henry Gibbons, Quartermaster General?

A. I do.

Mr. Clark: This is marked Respondents' Exhibit 219, and it is merely marked for identification, if the Court please.

Is that sufficient for identification?

The Witness: That is right.

By Mr. Clark:

Q. Is it not a fact, Major, that during 1933 Army bids for Fort Lewis in the State of Washington were invited only f.o.b. Fort Lewis?

A. I cannot recall definitely. I was not on duty here or at Fort Lewis so I cannot recall what the policy was without looking up the records.

Q. Well, isn't it true that at all times between February 24, 1934, and September 18, 1936, that is within the period of your service here, isn't it?

A. Yes, sir.

Q. The invitations of the Quartermaster Corps called for bids only f.o.b. Fort Lewis?

A. I cannot answer that definitely. If they in-

21184 vited bids only f.o.b. destination at Fort Lewis, it was probably for some very excellent reason, local condition that required it.

Q. I am coming to that in a moment. Your analysis, I think, will prove to be correct: Isn't it correct that since May 10, 1937, to this present date, today, the Quartermaster Corps has called for bids both f.o.b. shipping point and f.o.b. destination in the State of Washington, apart from Fort Lewis though?

A. That is generally true throughout the service in all states.

Q. It is true, isn't it, that neither Superior Portland Cement, Inc., which is a cement company of Seattle, nor any other company in western Washington has refused to bid f.o.b. mill on any invitation issued by the Quartermaster Corps?

A. I cannot state.

Q. Or on any Army invitation?

A. I cannot state without referring to our records.

Q. Isn't it correct, I don't like the word "true," isn't it correct that since you have been in your present position in Washington, I think this is a correct statement of fact, the Quartermaster Corps has received f.o.b. mill bids from Superior Portland Cement Company, Inc., at Seattle?

Mr. Paulson: I object. I object to all of these questions of this type that call for hearsay answers.

Mr. Clark: I am asking if it is not correct.

21185 Mr. Paulson: It would still be a hearsay answer.

Trial Examiner Norwood: I shall ask the witness to answer that from his own knowledge.

A. I cannot answer that without reference to a record.

By Mr. Clark:

Q. You did not produce invitation 488-38-92 for an opening June 27, 1938, at Fort Lewis, Washington, did you?

A. I don't recall that number.

Q. Well, you didn't produce any invitations today?

A. No, sir.

Q. You didn't bring any with you?

A. No.

Q. That called for a price on 800 barrels of cement f.o.b. shipping point, f.o.b. Fort Lewis; isn't it true that in that instance, and for opening June 27, 1938, Superior Portland Cement Company, Inc., bid both f.o.b. mill and destination.

Mr. MacIntyre: If Your Honor please, there is an objection to the question. It deals with a transaction that took place many months after this witness appeared here on his previous testimony. He could not at that time have testified to it. He could not have had any knowledge about it. Six months to a year later something occurs and he is now asked on deferred cross-examination.

21186 Trial Examiner Norwood: Is that true?

Mr. Clark: That is correct.

Trial Examiner Norwood: Objection sustained.

Mr. Clark: Wouldn't Your Honor hear me on that for a moment?

Trial Examiner Norwood: I don't see that anything can be said. Go ahead.

Mr. Clark: Ever since the witness testified. For example, he had made an admission day before yesterday that the testimony that he gave before was incorrect, certainly nobody would contend that we would not be permitted to show that admission.

21187 Now, here is another independent fact; that it would be independent and admissible.

Trial Examiner Norwood: It is not an admission.

Mr. Clark: No, it is not an admission, but it is in the nature of contradictory of the witness' statement on the witness stand before.

Trial Examiner Norwood: It doesn't contradict it in the slightest, something that happened after he made the statement.

Mr. Clark: So that I may be clear with Your Honor; so that my mind moves along with yours, it is because he could not have had it in mind when he made his statement and therefore does not apply?

Trial Examiner Norwood: Yes, sir.

Mr. Clark: Well, if Your Honor please, in deference to Your Honor's ruling, and to Your Honor, of course, I want to make an offer to show that in the instance that I have just described the Superior Portland Cement Company bid f.o.b. mill and f.o.b. destination, and the bid was made on the f.o.b. destination basis in spite of the fact that a saving would have been realized if it had been made on the f.o.b. mill basis.

I am going to ask him to produce that invitation.

Trial Examiner Norwood: I am not saying that
21188 you may not show as part of your case some of these subsequent matters, but is is very clear that the matter has no place here in this cross-examination, so I sustain the objection and refrain from asking the witness to bring in any such paper.

By Mr. Clark:

Q. With reference to the Washington bids and the Fort Lewis invitations that I asked you about a moment ago, you had not examined those at the time you gave your testimony before in this case, had you, Major?

A. Again I must say that I cannot specifically state that I did or did not examine the invitation, but we examined all the correspondence and invitations that were in question at the time.

Q. So you cannot say now whether you did or did not examine those?

A. No, I cannot state at that time.

Cross-Examination of R. H. Armstrong, witness for the Commission.

21203 Q. And you didn't have any documents at that time relating to the question of whether or not any Washington or Oregon company had bid on Bureau of Prisons' invitation on a Government destination cost basis, isn't that correct, or is that question too involved?

A. It is not too involved, but I am not sure of the answer. It is very possible I might have had an invitation to bid with me for the United States Penitentiary at McNeil Island, Wash.; although I do not remember, definitely.

Q. How can you ascertain whether you had that?

A. The only way I know it could be ascertained would be from my testimony. If I testified regarding such an invitation there should be a record of it. The papers I had were sent to file.

Q. Do you know how the invitations to bid for cement at McNeil Island, or for the McNeil Island penitentiary are phrased?

A. Do I know how they are phrased?

21204 Q. Yes, they invariably read: "F.o.b. penitentiary scow your wharf Tacoma," don't they? I hand you what purports to be a copy of an invitation, bid,

and acceptance on United States standard form 33 Revised—this is the original, what purports to be the original—it bears a date subsequent to the date of your testimony, but please examine that document (handing document to the witness.)

Mr. Clark: May I have it marked for identification?

Trial Examiner Norwood: Mark it. Is that one of those papers about transactions subsequent to the witness' previous testimony?

Mr. Clark: That is right, Your Honor, but I have a special purpose in mind, here.

Trial Examiner Norwood: It may be marked.

(Thereupon the document referred to was marked Respondents' Exhibit No. 223, for identification.)

By Mr. Clark:

Q. You have read the first two paragraphs, have you, Mr. Armstrong; to yourself?

A. Yes.

Q. That is a form of an invitation, bid, and acceptance on United States standard form 33 Revised; I am referring to Respondents' Exhibit 223, for identification; is it not?

21205 A. Yes.

Q. And it reads:—

Mr. Wooden: I object to the reading of the contents of a document in evidence.

Trial Examiner Norwood: Objection sustained.

By Mr. Clark:

Q. Well, does the form of the invitation issued by the Department of Justice for cement at McNeil Island prior to January, 1938, differ at all ~~from the form which I have~~ just shown you and which is Respondents' Exhibit 223, for identification?

A. I couldn't answer a question of that kind without a reference to the records.

Q. Don't you invariable and haven't you invariably issued the invitations for cement, to bid on cement, at McNeil Island prison f.o.b. penitentiary scow your wharf Tacoma; isn't that a fact, Mr. Armstrong?

A. I don't know but I don't think so.

Q. Do you know where McNeil Island is? It is near Tacoma, Washington, isn't it?

A. That is right.

Q. Can you give us any instance of an invitation for cement for McNeil Island having been made to bid f.o.b. mill?

A. No, I can't give any instance without reference to the record. My memory isn't that long.

21206

Q. Do you know whether or not you ever had the cement for McNeil Island loaded at Seattle?

A. I don't know.

Q. Isn't it a fact that the practice of calling for invitations f.o.b. wharf at Tacoma originated because trusties from the prison received cement and there was less danger of them escaping if they received it at Tacoma than at Seattle?

Mr. Wooden: I object to that question. It is wholly irrelevant and immaterial.

Trial Examiner Norwood: Read the question.

(Question read.)

Mr. MacIntyre: There is a further objection: The witness has already answered another question to the effect he didn't know or can't recall, at this time, on what basis the bids were invited or received and now Mr. Clark is asking him whether or not it was on this basis.

Trial Examiner Norwood: He has a right to probe his memory, hasn't he?

The objection is overruled.

Mr. Wooden: I say it is irrelevant and immaterial.

Trial Examiner Norwood: The objection is overruled.

Answer the question.

21207 A. The answer is no.

21214 Q. Now, do you know anything to the contrary of the statements that none of the invitations calling for bids on cement for use at McNeil's Island have ever asked for prices f.o.b. manufacturer's shipping point? Do you know anything to the contrary of that, Mr. Armstrong?

I am asking you for your knowledge, not what you think, Mr. Armstrong.

A. All right, I do not definitely remember without referring to the records.

Q. Well, then, the answer is that you do not know, as you sit on the witness stand, anything to the contrary of that statement; is that right?

A. That is right.

Q. How many federal prisons are there in the Pacific Northwest? Only one, isn't there, at McNeil's Island?

A. There is a federal prison camp at Fort Lewis.

Q. Well, the Bureau of Prisons has one station for which it buys cement, hasn't it, and that is the one at McNeil's Island.

21215 A. I would not say that.

Q. Well, what would you say?

A. It may buy cement for the federal prison camp at Fort Lewis, Wash.

Q. How long has that been in existence?

A. I don't know the exact date of shipment. I think it was along about 1932 or 1933.

Q. Well, how did you buy it there,—f.o.b. Fort Lewis prison camp?

A. That might be it, either way.

Q. Well, do you know how you would buy it? I am asking you for your knowledge as you sit there now on the witness stand.

A. Depending on circumstances we might request bids f.o.b. Fort Lewis, and we might request them—

Mr. Clark: I move to strike the answer on the ground it is not responsive.

Trial Examiner Norwood: Read the question and the answer.

(Question and answer read.)

Trial Examiner Norwood: Finish your answer.

A. F.o.b. plant—mill, instead of plant.

Trial Examiner Norwood: Motion denied.

By Mr. Clark:

Q. Well, do you know how you buy it, whether f.o.b. plant or f.o.b. destination, Fort Lewis Prison Camp?

21216 A. I have been trying to make it clear to you that we have no definite policy as to specifying f.o.b. mill or f.o.b. destination.

Q. Well, the answer is you don't know how you buy it, isn't that it?

A. No.

Q. That is not the answer?

A. That is not the answer to that question.

Q. Do you know whether you have ever bought any cement from the Superior Cement Company, Inc., at Seattle for the Prison Camp at Fort Lewis?

A. I do not.

Q. Do you know whether you have ever asked them to bid, by you, I mean the Bureau of Prisons; on cement requirements for either McNeil Island or the Prison Camp at Fort Lewis?

A. I couldn't definitely, without reference to the record.

Cross-Examination of A. B. Custer, witness for the Commission.

21293 By Mr. Clark:

Q. Passing to another phase of the examination—you may relieve yourself of the burden of that, Mr. Custer. It is a fact, is it not, Mr. Custer, that since 1927 the Superior Portland Cement Company of Seattle has repeatedly quoted f.o.b. mill prices in response to Navy Department invitations for cement to be used at Bremerton, Wash., and other points in western Washington, and that many awards have been made to Superior Portland Cement on an f.o.b. mill basis.

A. I couldn't answer that as a definite statement.

Q. Can you point out a single instance in which
21294 the Superior Portland Cement, Inc., has either orally or in writing refused to quote on f.o.b. mill basis?

A. I am not in a position to state definitely whether they have or have not. I would like to explain here that in so far as Puget Sound, Wash., is concerned, it is customary, not necessarily the invariable rule, but customary for the Navy Yard in Puget Sound to buy its own cement. The invitations are issued from Puget Sound, bids are received, and awards are made by that navy yard.

It is unnecessry, I think, for me to explain the reason why that is done.

Q. When you testify that Exhibits 378 to 382, inclusive, represented a cross-section or constituted a cross-section of the bids received by the Navy Department, you intended, I assume, if you didn't you will correct me, to include only the companies that are mentioned in those bids in that characterization, isn't that true? You didn't intend, for example, to include such a company as the Superior of Seattle?

A. Well, I had no thought of individual bidders.

Q. Then your characterization applied only to the companies mentioned in bids 378 to 382, inclusive?

A. I would put it this way, that I intended this to apply to bids disregarding the names, particular bidders, the names of bidders would not be of any particular moment. It was the bids.

Cross-Examination of H. H. Rice—witness for the Commission.

21407 By Mr. Little:

Q. Mr. Rice, when you testified on direct examination had you made any investigation of invitations for the Engineers' Office in the State of Washington?

A. On direct examination, you say?

Q. Yes. Had you made any investigation of the Engineer's Office invitations for bids on cement to be used in the State of Washington?

A. I don't recall any at the moment.

Q. When you testified on direct examination that the Engineers' Office had been unsuccessful in getting f.o.b. mill bids you didn't refer to any specific invitation in the State of Washington?

A. I didn't have any specific instance in mind.

Q. I think you testified that in the period from
21408 1935 to 1937 you weren't getting any f.o.b. mill bids. Do you recall having so testified?

A. Yes.

Q. Do you know how many invitations for bids for the Engineers' Office were issued for the period in the State of Washington?

A. I wouldn't have any way of telling that.

Q. You have no recollection at all?

A. No.

Q. Have you at any time, or has anyone, at your request, made any investigation of the bidding between 1935 and 1937 for the Engineers' Office in the State of Washington?

A. I don't know of any such.

Q. Would you then deny that there was only one invitation to bid for cement of the Engineers' Office in the State of Washington during that period, and that was the

invitation No. 868-38-109, opening November 29, 1937, calling specifically for f.o.b. price at Sylvana, Wash.? Would you deny that?

A. I wouldn't deny it. I know nothing about it.

Q. You have no knowledge one way or the other?

A. I have no knowledge one way or the other.

Q. Coming down to the period after 1937 until the present date, have you any idea how many invitations were issued during that time for cement for use of the Engineers' office in the State of Washington?

21409 A. I have not.

Q. Then you wouldn't be in a position to deny the fact that there were only approximately seven invitations during that time, would you?

A. No.

Q. And you wouldn't deny in every single instance, Mr. Rice, of invitation to bid for the Engineers' Office for use of cement in the State of Washington the Government has not asked for an f.o.b. mill bid?

A. Because I know nothing about the invitations; I am not familiar with that.

Q. So, therefore, your general statement you made on direct had no reference to any particular situation in the State of Washington?

A. No, I think any statement I made on direct examination was based on my general experience and the papers being offered in evidence, and I have no recollection of any in the State of Washington.

Recross-Examination of H. H. Rice, witness for the Commission.

21429 By Mr. Svefelman:

Q. Mr. Rice, I haven't had a chance to examine all those documents, but I judge from your explanation that none of those instruments that have been marked for identification have anything to do with the situation in the State of Washington.

A. No, it is my recollection all the papers I brought refer to Los Angeles, Tucumcari, and Bonneville, so they would be outside of the State of Washington.

Q. So they have no reference?

A. That is right.

Cross-Examination of P. I. Taylor, witness for the Commission.

21541 By Mr. Little:

Q. Mr. Taylor, will you refer to Respondents' 21542 Exhibit 200-A to H, inclusive? I believe that is the letter which was sent on behalf of the Superior Portland Cement, Inc., the original being sent to Mr. Wooden and a copy sent to you and contains a list of the documents which I requested to have produced on behalf of Superior. Do you have that with you?

A. What I have is a copy of the subpoena.

Q. Will you turn, now, to Respondents' Exhibit 200-D. That is page 3 of the schedule attached to the subpoena of the Superior Portland Cement. You will find, Mr. Taylor, on Respondents' Exhibit 200-D, and continuing over to 200-E, a list of invitation numbers involving Reclamation Bureau projects, do you not?

A. Yes.

Q. Are you in a position to say, Mr. Taylor, whether or not the list of the invitation numbers which is included on Respondents' Exhibits 200-D and E, contain, so far as you know, all of the invitations for Reclamation projects in the State of Washington from 1926 until 1938?

A. No, I couldn't state.

Q. You are not in a position either to affirm or deny that?

A. No.

21555 Q. How long have you been with the Bureau of Reclamation?

A. I have been with the Bureau of Reclamation for 33 years.

Q. And during that period of time you have had considerable to do with invitations for bid and the bids and the awards on reclamation projects?

A. I have, for the last eight or ten years, had practically all to do with the handling of bids and recommendations for award. Prior to that the Engineering Division occasionally handled or partly handled cement cases and awards for other materials and that covers a period back, possibly, oh, 15 or 18 years.

Q. And part of your testimony in this case is based

upon the experience gained during that 10 or 15 years prior to the time that you had charge of these?

A. No, I wouldn't say that. My testimony was based on my experience only in handling all cement cases during a period, the best of my recollection, about eight to ten years. It is hard to say just when I did—

Q. Then, Mr. Taylor, your testimony in this case is not based upon any invitations to bid or any bids received or awards made in 1926 or any previous year?

A. I would like to answer that by saying that in my direct testimony I did make a general statement relative to cement bids prior to the Code; just a general statement based on my knowledge of the situation from my ex-
21556 perience in handling cement cases here in Washington.

Q. Then you don't want to confine it to a 10-year period prior to the time you were on the stand as was in the statement read to you this morning?

Mr. Wooden: What was the statement?

Mr. Little: The statement that Mr. Shefelman read this morning.

By Mr. Little:

Q. That is what you had reference to?

A. That was a general statement based on my experience in handling cement cases here in Washington?

Q. Did it include or might it have included, in your opinion, any invitation in 1926 or any prior year?

A. Yes.

Q. It might have?

A. Yes.

Mr. Little: Then, I submit, if Your Honor please, it is quite proper to have this document produced. I don't want to prolong this cross-examination. I have told Counsel and the witness and Your Honor I have asked Mr. Taylor to produce, to the best of our knowledge, all of the Reclamation bids which covered cement for use in the State of Washington. There is no selection process on our part.

21557 This happens to be one in 1926 and if the witness thinks there is any chance he may have based any general statement he may have made on this invitation, we have a right to have it in and I can't see why Counsel

should object because it is our effort to put in the whole record and it would save time to let it go in.

Trial Examiner Norwood: I shall overrule the objection and let Counsel put it in.

Mr. Wooden: I haven't had time to make an objection, yet.

Trial Examiner Norwood: You made the original objection.

Mr. Wooden: I mean to this last.

I want to say this: That the witness' direct testimony, in so far as it had my bearing whatever on this earlier period, was simply to the effect that an f.o.b. mill bid was common. Now they want to put in some bid to show f.o.b. mill bidding occurred.

Trial Examiner Norwood: He wants to show the witness was right.

Mr. Wooden: But it is useless.

Mr. Shefelman: As I remember Mr. MacIntyre's statement and Mr. Wooden's statement, I refer to Mr. MacIntyre's statement following Mr. Wooden's objection a while ago, I gather Counsel for the Commission con-
21558 cede that mill bids have frequently been made during the past 10 years.

Mr. MacIntyre: If Your Honor please, during that period of 1927 to 1933 I imagine that we would accept the witness' statement that appears at line 12, page 242, in which he says that during the period 1927 to 1933 that out of 15 instances, 14 of them were f.o.b. mill bids; 15 different sets of bids.

Now, of course, that was prior to the Code. Of course we would accept this witness' testimony to that effect.

They are just merely encumbering the record and delaying the case by adding or attempting to add to that because we are conceding that.

Trial Examiner Norwood: I think the shortest way is to let the Counsel—

Mr. MacIntyre: We are conceding that.

Trial Examiner Norwood: —put in this information, the complete story of his—

Mr. Wooden: It doesn't look like cross-examination at all to me.

Mr. Little: In order to shorten this, if Your Honor

please; may I ask Counsel for the Commission if they will concede that in the period prior to the Code, Superior Portland Cement, Inc., and other companies in west-
21559 ern Washington—that would include the Northwestern Portland, Inc.—bid f.o.b. mill whenever requested? Will they concede that point?

Mr. Wooden: That is going further than I would be willing to concede. I am willing to concede that they sometimes did.

Trial Examiner Norwood: I will overrule the objection. Go ahead.

21571 Q. Then the general statement that you made was not based upon any invitation to bid or any bids received in response thereto in a period prior to the code in the State of Washington?

A. It did not refer to western Washington or any other section of the west: it was a general statement covering all our projects which were in several States.

Q. And you wouldn't deny that the companies in western Washington have never refused to bid f.o.b. mill prices?

21572 A. I couldn't deny it, no.

Mr. Little: Then, with that explanation which clearly indicates that this witness didn't intend that generalization to apply to companies in western Washington, I will not proceed any further with the invitations prior to or during the Code.

Mr. Shefelman: May I say one thing: There has been much talk about prior to the Code.

I judge, Mr. Taylor, you have reference, of course, to the effective date of the Code which was in December, 1933. Am I not correct? When you speak of prior to the Code period you mean any time prior to December, 1933?

The Witness: I believe that is so.

Mr. Shefelman: And you intended to so testify on your direct examination, did you not?

The Witness: Yes. I intended to cover the period prior to the Code, the Code period, and since the Code up to the time the Procurement Division—

Mr. Shefelman: I want to fix that date in my mind and that should be December, 1933, should it not?

The Witness: I believe that is so.

Mr. Wooden: The witness testified over and over again two weeks ago to the same effect as he is now testifying to, that he had no particular companies in mind.

21573 Mr. Shefelman: I still believe we have a right to show he, in particular, did not have our company in mind.

Mr. Wooden: Isn't "no" broad enough for you?

By Mr. Little:

Q. Will you now produce, please, invitation No. 33539-A? That is the invitation number on the top of Respondents' Exhibit 200-E.

Mr. Little: I will say to Your Honor and to Counsel that I have refrained from asking about invitation numbers shown on the balance of Respondents' Exhibit 200-D, which is page 3 of the schedule attached to the subpoena of Superior Portland Cement, Inc., on the ground, first, that the bids which involved more than $10,000 were all prior to the Code and upon the further ground that a score of them were bids involving approximately 200 barrels or at least less than the amount of $10,000 and I think the first one which involves $10,000 and which also was after the Code is A-33539-A.

21574 Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. Little:

Q. Do you have that invitation, Mr. Taylor?

A. Yes.

Q. That is the invitation, is it, for the Yakima-Roza project, 16,000 barrels, invitation June 24, 1936, and opening date July 2, 1936?

A. Yes.

21590 By Mr. Shefelman:

Q. Judging from your last answer to Mr. Little's question, I take it you did not at any time, in the course of this hearing, intend to testify, or intend that it be inferred from your testimony that the Northwestern Portland Cement Company at any time refused to bid f.o.b. mill on any project that you know of, or you have ever heard of, or that your department was interested in?

21591 A. I can't answer that "yes" or "no." I would answer that by saying that I did not have the North-

western or Superior in mind, or no other cement company in mind when I made my general statements on direct testimony.

Q. Well, when you made your general statement you did not have in mind any particular instance in which the Northwestern or, for that matter, the Superior were involved, did you?

A. No.

Q. And you, therefore, did not intend that it be inferred from your testimony that either of those companies at any time refused to bid f.o.b. mill in response to an invitation for such bids? May I go further and say that you certainly could not have intended to so infer if you didn't have either of them in mind?

Mr. MacIntyre: We object to that question. It is argumentative in form.

Mr. Shefelman: I will withdraw the second portion of the question and let the first portion stand.

Trial Examiner Norwood: Read the first portion.

(The record was read.)

Trial Examiner Norwood: Answer that.

A. I did not intend to infer that either of those companies refused to—

Cross-Examination of S. Rothbard, witness for the Commission

21680 S. ROTHBARD was thereupon recalled as a witness for the Commission, and, having been previously sworn, testified further as follows:

Cross-Examination by Mr. Little.

Q. Your full name is Sol Rothbard?

A. That is correct.

Q. You are an attorney in the Bureau of Reclamation?

A. That is true.

Q. Do you recall what day you were on the stand on direct examination, Mr. Rothbard?

A. Well, it was some time in December of 1937.

Q. December, 1937.

You testified, did you not, that your position was attorney for the Bureau of Reclamation?

A. Yes.

Q. And in December, 1937, you said that you had been attorney for the Bureau for four years?

21681 A. Yes.

Q. That would be in 1933 that you commenced working for the Bureau.

A. Approximately then.

Q. I assume, Mr. Rothbard, that just as Mr. Taylor testified, that your experience is confined to cases involving more than $10,000, is it not?

A. Yes.

Q. In other words, small bid openings do not come over your desk?

A. That is right.

Q. Now, Mr. Rothbard, at the time you were on the stand, in December, 1937, did you have any knowledge, personal knowledge, of invitations to bid and bids in response thereto, and abstracts of bids for the use of cement for the Bureau of Reclamation in the State of Washington?

A. Well, my testimony wasn't confined merely to the State of Washington or to any one particular State. My testimony was general, I mean, not specific with reference to one State, but generally with respect to other States, as well, as the State of Washington.

Q. Mr. Rothbard, what specific invitation to bid and what bids in response thereto involving reclamation work in the State of Washington had you any knowledge concerning?

A. Well, you mean any one particular bid?

21682 Q. Yes.

A. You want me to answer that by giving you the specification number or invitation number?

Q. Yes.

A. I can't do that offhand.

Q. Did you have any in mind when you were on the stand?

A. I suppose I did at that time, yes.

Q. Do you know what ones?

A. I can't say at this time.

Q. Do you know, Mr. Rothbard, and I will tell you now so that it will be perfectly clear, that I am asking you only for the period after the expiration of the code, roughly. I

am asking you now for the period of 1936 and 1937, since you were on the stand in December, 1937.

Do you have in mind any case where the Reclamation Bureau asked a company in Western Washington to bid on a Reclamation project for cement to be used in the State of Washington where a Western Washington company declined to bid f.o.b. mill? I am asking you if you know of any case.

21683 A. Off hand, I can't answer that, no.

Q. You don't know?

A. There might have been, but I can't answer that now without refreshing my memory and going over our records.

Q. You don't know of your own personal knowledge whether there were or there were not?

A. At this moment, I don't.

Q. In other words, the bids and the invitations and the responses thereto; the bids in response thereto, and the abstracts would be the best evidence of that?

A. Exactly.

Q. In other words, you didn't mean in your testimony to give any instances which would conflict with the invitations to bid and the bids in response thereto?

A. That is right.

Q. And you wouldn't be in a position to say now, and you didn't intend to say then, that you knew of any specific instances where a company in western Washington had refused to bid f.o.b. mill?

A. I will repeat what I said before, that I had no intention to—or my testimony didn't imply that any particular Washington company refused to bid as we invited them to bid. My testimony didn't go to any one particular State. I was not specific. It was in a general way.

Q. Mr. Rothbard, have you personally examined—

21684 I will restate that. Had you personally examined at the time you were on the witness stand any of the invitations to bid and the bids in response thereto which were identified by Mr. Taylor and offered in evidence yesterday and which affected the companies in western Washington?

A. Well, I don't know what Mr. Taylor testified to yesterday or what he identified yesterday. I wasn't here and I don't know. I can't tell.

Q. I will state to you, Mr. Rothbard, that yesterday I

cross-examined Mr. Taylor with reference to all of the invitations to bid, according to our best knowledge, for cement for the Reclamation Bureau in the State of Washington, both prior to the Code, during the time that Mr. Taylor was with the Reclamation Bureau, and after the Code, which involved more than $10,000, and I am now only asking you with reference to the bids which were following the Code, since you were not with the Reclamation Bureau prior to the Code.

Mr. MacIntyre: Up to what date, Mr. Little?

Mr. Little: Up to 1937, since he states that he was on the stand December, 1937.

By Mr. Little:

Q. I am asking you if you examined the invitations, the bids, and the abstracts on those reclamation projects involving more than $10,000.

21685 A. It is difficult to answer that question. I did examine some. I can't say whether I examined all of them. If I knew exactly what Mr. Taylor had testified to, I could say whether I did examine them or not.

Q. Well, I am asking you now whether you have any personal recollection at this moment—

A. No, I don't.

Q. —of the contents of the invitations and the bids and responses thereto.

A. At this moment, I do not, without being given an opportunity to examine those papers. I can't say.

Q. And it is also true, of course, that you had no personal specific knowledge of the contents of those invitations and bids when you were on the stand, in December?

A. Well, now, I wouldn't say that.

Q. You don't know one way or the other?

A. Well, at this moment, I can't, no.

Q. Of course.

Mr. Little: Will Your Honor indulge me just a moment?

Trial Examiner Norwood: Certainly.

(Pause.)

Mr. Little: I think that is all, Your Honor.

Mr. Clark: May I just ask a question or two, 21686 Your Honor?

By Mr. Clark:

Q. Mr. Rothbard, you may have answered this question

in response to Mr. Little, but I didn't hear it, if you did. The documents or matters that came under your scrutiny, your personal scrutiny and knowledge by the time you testified here, in December, 1937, in Bureau of Reclamation matters relating to the Bureau of Reclamation in the purchase of cement, involved only, as I understand it,—and you correct me if I am wrong,—purchases of $10,000 or more?

A. Yes.

Q. Is that right?

A. That is true.

Q. So it is correct, then, that you had no personal scrutiny or knowledge of contracts for less than $10,000 at that time?

A. That is true.

Q. You stated in response to a question by Mr. Little, as I understood your answer, that by your testimony given on direct here in December, 1937, you did not mean to imply that any specific company had refused to bid as requested by the Bureau of Reclamation? Have I stated that correctly?

A. That is true, but I will say this also: I wasn't referring to any one particular company. I was just talking in general terms.

Q. Yes.

21687 A. Referring to all of them in general.

Q. Very well. Then I take it that you did not intend your testimony to imply that the California Portland Cement Company at Los Angeles had refused to bid as requested by the Bureau of Reclamation, that being a specific company?

A. Yes—well, that is true.

Q. Your answer to that would be that you did not intend to imply that?

A. That is true.

Q. Is that right?

A. Yes.

Mr. Clark: That is all.

By Mr. Little:

Q. By the same token, you didn't mean your testimony to be implied to the Superior Portland Cement, Inc.?

A. I didn't intend my testimony to cover any one par-

ticular company. I was just talking about all the companies we were doing business with at that time.

Q. Or to indicate that any specific companies had necessarily within your own personal knowledge refused to bid as requested? It was purely a general statement and it didn't refer to any specific company?

A. It refers to all the companies, not any one particular company.

21688 *Redirect Examination by Mr. Wooden.*

Q. Did you have it in mind at all, Mr. Rothbard, that any particular company might not—that your general statement might not apply to any particular company?

A. It might apply and it might not.

Q. Even as to any particular company, such as the ones named by Mr. Clark and Mr. Little, do you still recognize that your general statement might have applied to those?

Mr. Clark: I object. That is calling upon the witness to speculate.

Mr. Little: I also object.

Trial Examiner Norwood: I think he may tell us whether he did or did not intend to include these companies. I think he has told us that.

You are asking him whether they might have been included, without his specific knowledge?

Mr. Wooden: Whether he intended to exclude any particular company, is what I am trying to get.

By Mr. Wooden:

Q. In your general statement on direct did you intend to exclude any particular company?

A. No.

Mr. Wooden: That is all.

21689 *Recross Examination by Mr. Little.*

Q. Did you have in mind any specific refusal by Superior Portland Cement or—

A. That is difficult to answer.